Petition

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

CROWN SIMPSON PULP COMPANY, and
LOUISIANA-PACIFIC CORPORATION,
Petitioners,

v.

ANNE M. GORSUCH, Administrator,
Environmental Protection Agency,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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LISTING OF PARENT COMPANIES, NON WHOLLY OWNED SUBSIDIARIES AND AFFILIATES OF PETITIONERS

Petitioner Crown Simpson Pulp Company is a partnership between Crown Zellerbach Corporation and Simpson Timber Company. Crown Zellerbach Corporation's other non wholly owned subsidiaries or affiliates are Crown Simpson Corporation, 50% of which is owned by Simpson Timber Company, Crown Zellerbach Canada Limited, Papierfabrieken Van Gelder Zonen, N.V. (Van Gelder Papier), a Netherlands corporation, and Laja Crown, S.A., a Chilean corporation, 50% of which is owned by Compania Manufacturera de Papeles y Cartones, S.A. Simpson Timber Company is a closely held corporation. Approximately ninety percent of its stock is held by Kamilche Company, a private holding company owned by members of the Reed family.

Petitioner Louisiana Pacific Corporation has no affiliates which are not wholly owned.

QUESTIONS PRESENTED

The California State Water Resources Control Board granted petitioners variances from the Environmental Protection Agency's national effluent limitation guidelines because it found that those guidelines, if applied to petitioners' unique facilities, would result in significant adverse environmental and energy impacts, with no corresponding effluent reduction benefit whatsoever. The veto of that action by the Agency, and the approval of that veto by the court below, were predicated on the proposition that the cost/benefit analysis required by section 304 of the Clean Water Act may never include any water quality considerations. Both the Agency and the court below disregarded the plain meaning of section 304, ignored decisions of other courts of appeal and this Court, and failed to give the due deference which Congress intended to the role of states in the permitting process. Accordingly, the questions presented are as follows:

1. Does the opinion below, by prohibiting a duly-authorized permit issuer from considering the expected effluent reduction benefits of treatment in relation to the environmental, energy and economic costs of treatment when deciding whether a variance is appropriate, a) contravene the language and intent of section 304(b)(1)(B) of the Clean Water Act and b) conflict with decisions of other courts of appeal?

2. Is the decision of the court of appeals consistent with this Court's intended applications of its decisions in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) and *National Crushed Stone Ass'n. v. EPA*, ...U.S....., 101 S. Ct. 295 (1980)?

3. Does the court of appeal's approval of EPA's veto of an authorized state permit and variance, issued after lengthy state administrative proceedings, and its deference to EPA's interpretation of the Act and its regulations and EPA's characterization of state administrative proceedings in which EPA did not participate, wrongfully usurp the role which Congress intended the states have in administering the National Pollutant Discharge Elimination System?

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Environmental Protection Agency,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Crown Simpson Pulp Company and Louisiana-Pacific Corporation ("petitioners") petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 642 F.2d 323 (9th Cir. 1981). The order of the court of appeals, dated July 31, 1981 (App. B, *infra*), entered on petitioners' motion, recalling and staying its mandate pending resolution of this

petition, is not reported. The decision of the Administrator of the EPA (App. C, *infra*) is reported at 10 ERC 1841 (1977). The decision of the California State Water Resources Control Board (the "State Board") (App. D, *infra*) was not reported. Since this case was brought on a direct review petition to the court of appeals, there is no district court opinion.

This case was previously before this Court on a writ of certiorari to review the judgment and opinion of the Ninth Circuit on the issue of jurisdiction. On March 17, 1980 this Court issued a *per curiam* opinion, reported at 445 U.S. 193 (1980), granting that petition, summarily reversing the Ninth Circuit on the jurisdictional issue, and remanding the case to the Ninth Circuit for consideration on the merits. Upon remand the case was reargued and decided, and it is from this latter decision on the merits that petitioners seek this writ of certiorari.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*) was entered on April 20, 1981. On June 18, 1981, by order of this Court (App. E, *infra*), petitioners were granted an extension of time to and including August 10, 1981 within which to file this petition for writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are: 33 U.S.C. §1311(a) and (b) [Sections 301(a) and (b) of the Clean Water Act]; 33 U.S.C. §1314(b)(1) and (B) [Section 304(b)(1) and (B) of the Clean Water Act]; 40 C.F.R. §430.72 [EPA's variance provision for market bleached kraft pulp mills]; 40 C.F.R. §125.31 [EPA's variance regulations]. These are reprinted verbatim in App. F, *infra.*

STATEMENT OF THE CASE

Petitioners operate the only two market bleached kraft pulp mills in the United States which discharge directly into offshore ocean waters: All other such mills discharge into confined inland waters. The mills are located on the remote Northern California coast and discharge through deepwater outfall diffuser systems into the Pacific Ocean. The design of the discharge systems was chosen in cooperation with the State Board and the plant and diffuser sites were selected (despite additional costs) because the currents, depth, turbulence and other characteristics of the Pacific Ocean in the area eliminate environmental concerns that may arise from the location of such plants in other areas.

In 1972 Congress amended the Clean Water Act (the "Act"), to require industrial dischargers to achieve the best practicable control technology currently available ("BPT") by July 1, 1977. 33 U.S.C. § 1311(b)(1)(A). BPT requirements are imposed on individual dischargers ("point sources") through National Pollution Discharge Elimination System ("NPDES") permits. 33 U.S.C. § 1342. Pursuant to the statutory scheme, and consistent with congressional policy to preserve the primary responsibilities of states to control water pollution, EPA delegated its authority to issue NPDES permits in California to the State, 33 U.S.C. § 1342 (b) and (C), retaining, however, authority to review state-issued permits. 33 U.S.C. § 1342(d)(2).

The Act also directed EPA to promulgate nationwide "effluent limitations" for "point sources," 33 U.S.C. §1311, to publish "guidelines" for effluent limitations defining BPT for "categories" of point sources, 33 U.S.C.§1314(b)(1), and to specify the factors to be taken into account in determining the control measures and practices to be imposed on individual point sources within such categories. 33 U.S.C. §1314(b)(1)(B). Recognizing that implementation of the entire program contemplated by Congress would be a major undertaking, EPA issued generic BPT guideline limitations on an industry-by-industry basis. EPA's method-

ology was challenged in *E. I. duPont de Nemours & Co. v. Train,* 430 U.S. 112 (1977). Because the relationship between "effluent limitations" for "point sources" and "guidelines" for "categories" was unclear, this Court upheld EPA's authority to establish generalized BPT effluent guideline limitations, but only "so long as some allowance is made for variations in individual plants. . . ." 430 U.S. at 128.[1]

EPA belatedly published final BPT effluent guideline limitations for the pulp and paper industry in January 1977, only six months before the July 1, 1977 BPT deadlines. *E.g.,* 40 C.F.R. § 430.72 (1977). These guidelines considered pulp and paper facilities by general classification, without regard to environmental design or location. They did, however, contain what has become EPA's standard variance clause, which allowed an evaluation, on a case-by-case basis, of the application of the 1977 BPT guidelines to facilities found to be "fundamentally different" from those considered by EPA in the development of the guidelines. *Ibid.* The EPA regulation specifically granted authorization to issue variances to states, such as California, which EPA had previously approved to issue NPDES permits directly, but did not articulate any standards to be applied by state permit-issuing authorities in refusing or granting variances. *E.g., Appalachian Power Co. v. Train,* 545 F.2d 1351 (4th Cir. 1976) ("*Appalachian I*"). *The first time* EPA purported to define variance standards applicable to petitioners or anyone else was in the very opinion of the Administrator denying petitioners' variances in this case. (App. C.) Two years later, EPA finally issued additional variance regulations. 40 C.F.R. § 125.31 (1979).[2]

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1. This Court did not rule on the sufficiency of EPA's variance clause, 430 U.S. at 128 n. 19.

2. Although the 1979 regulations have never been applied to petitioners' variance applications, they perpetuate the restrictive view of the variance mechanism applied by the Administrator to the variances granted petitioners by the State Board, thereby *ex post facto* confirming EPA's veto.

The State Board, in March 1977, at the culmination of several years of extensive evidentiary and administrative proceedings before state agencies,[3] unanimously granted NPDES permits to petitioners together with BPT variances for two effluent parameters--BOD and pH. (App. D.) At the same time, the State Board imposed on petitioners other stringent and costly BPT limitations.

BOD is a measure of oxygen depletion caused by effluent discharges; pH is a measure of acidity and alkalinity. Based on uncontroverted evidence the State Board found that: 1) neither BOD nor pH is a pollutant in the circumstances of petitioners' discharges and that both parameters were meaningless when applied to petitioners' mills; and 2) imposition of EPA's BOD and pH guidelines would result in no environmental improvement or benefit. (App. D, pp. 47-49.) At the same time, the State Board found that substantial environmental and energy costs would unnecessarily and inescapably result from a requirement of full BOD and pH controls, and that it was environmentally counterproductive to impose EPA's BOD and pH guideline limitations. For example, installation of the secondary treatment facilities necessary to meet EPA's BOD and pH guidelines would, wholly apart from capital costs of millions of dollars, consume 5,200 tons of chemicals per year per plant, involve a total power use of 148,232,000 KWH annually (enough to supply nearly 10,000 homes), and produce substantial quantities of air pollutants (830,000 pounds annually of nitrogen oxides, sulpher dioxide and particulates) and biological sludge (4,200 tons per year) presenting substantial disposal problems. (App. D, p. 55.) In his veto decision, the Administrator of EPA did not dispute these findings. (App. C, p. 14.)

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3. The arduous course of the proceedings before the state agencies and EPA's lack of diligence therein are described in detail in App. C, pp. 27-30 and App. D, pp. 55-56.

The State Board also expressly found significant non-water quality impacts which were specific to petitioners' mills and which were not discussed in EPA's guideline Development Document.[4] For example, the State Board found that "very difficult" sludge disposal problems were presented "because of the unique situation of the dischargers' location on a sand spit in a heavy rainfall area . . . ." (App. D, p. 55.) The unique environmental setting of petitioners' mills is not mentioned anywhere in EPA's Development Document. Similarly, the State Board recognized regional energy issues, which are also ignored by the Development Document. (App. D, p. 56.)[5] The State Board then properly weighed the magnitude of the environmental, energy and economic costs of treatment against the complete absence of expected environmental benefits, and concluded that a variance was justified:

> *In appraising the evidence related to non-water quality environmental effects and energy requirements the Board must at least in part appraise the significance in terms of the potential environmental benefits to be gained as a result of the imposition of the EPA Guidelines.* In this case we have unrefuted evidence presented by the dischargers and concurred with by the Regional Board Executive Officer

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4. The Development Document describes the facts and assumptions upon which EPA based its BPT guidelines for the industry in general.

5. The only factors pertaining to petitioners' mills that apparently were specifically considered by EPA in developing the BPT guidelines were the data for "production, flow, BOD5, and TSS" for *one* of the mills. (App. C, p. 33, n. 23.) While EPA has complained that the State Board did not make specific findings of "fundamental differences" in the fashion required by EPA, nowhere in the proceedings below has the Administrator stated or presented examples showing that EPA in fact considered these same environmental impacts, or upon what basis EPA assumed such problems were the norm for the industry. The plain fact is that these mills are fundamentally different from all other bleached kraft pulp mills.

> that the existing discharges result in no water quality problems. Secondly, there is no expected or predictable water quality improvement to be achieved as the result of imposition of the EPA Guidelines. In light of these facts (the magnitude of the chemical and energy requirements, and the potential air and land management problems associated with sludge disposal) we can only conclude the evidence justifies the variance requested. (App. D, pp. 56-57; emphasis added.)

The State Board thus evaluated the total costs of treatment in relation to the effluent reduction benefits to be expected, as required by Section 304(b)(1)(B), 33 U.S.C. § 1313(b)(1)(B), and concluded that the variances were justified.[6]

The EPA then took over. On September 15, 1977, after denying petitioners' requests for hearings, the EPA Administrator issued a lengthy opinion rejecting the variances and permits granted by the State Board. (App. C.) Although EPA mischaracterized the State Board's decision as being based *solely* on the fact that petitioners' discharges do not harm water quality, EPA's veto effectuated its clearly declared position, affirmed below, that the environmental benefits of treatment, or the lack thereof, may *never* be considered in ruling upon a variance request. The fact that the State Board *considered* the lack of effluent reduction

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6. Despite EPA's characterization of the State Board's opinion as being based solely on water quality considerations, concurred in by the court of appeals (App. A, p. 6), the State Board's approach was very clear. Since secondary treatment for BOD and pH at petitioners' mills would result in no environmental benefit and would create substantial harm, including impacts not considered by EPA in promulgating the guidelines, the Board recognized that such a situation could not have been the "norm" envisioned by Congress or EPA in designing the guidelines. (App. D, pp. 47-49, 55-57.) Indeed, any contrary conclusion that this set of facts and circumstances *was* the norm for which the regulations were intended, not only casts doubt on the entire regulatory scheme, but lacks plain, common sense.

benefits of treatment in weighing the total costs of that treatment appeared to taint the entire variance proceeding in the eyes of the Administrator. Because of this, while accepting as true the factual findings of the State Board, the Administrator gave no deference to the State Board's conclusion that the total cost of treatment in relation to the lack of expected effluent reduction benefits justified the variances.

Petitioners sought direct review of the Administrator's veto of the variances before the Court of Appeals for the Ninth Circuit on October 5, 1977, relying upon the review provisions set forth in 33 U.S.C. § 1369(b)(1). Following briefing and oral argument, the Ninth Circuit rejected jurisdiction. 599 F.2d 897 (9th Cir. 1979). Subsequently, this Court granted a petition for a writ of certiorari on March 17, 1980, and issued a *per curiam* opinion summarily reversing the Ninth Circuit on the jurisdictional question and remanding the matter for consideration on the merits. 445 U.S. 193 (1980). After further briefing and reargument below, the court of appeals issued its opinion affirming the Administrator's decision on April 20, 1980. (App. A.)

REASONS FOR GRANTING THE WRIT

In direct challenges to the sufficiency of EPA's BPT variance provisions on their face, the courts of appeal have reached conflicting conclusions as to the proper scope of the variance provisions mandated by this Court in *duPont, supra.* In *National Crushed Stone, supra,* this Court held that EPA may not grant a BPT variance simply because an individual discharger could not afford to meet the effluent limitation guideline arrived at by EPA in applying the section 304 cost/benefit calculation, where there was no indication that EPA's cost/benefit calculation did not fit the circumstances of that discharger's facility. This case,

however, presents the Court's first opportunity to address and finally resolve what factors *may* be considered in granting or denying variances from EPA's BPT guidelines and, in particular, to decide whether the factors which may be considered include at least all of the factors identified in § 304(b)(1)(B) of the Act, including the total cost of technology in relation to the effluent reduction benefits to be expected from application of that technology. Furthermore, this case presents the Court with its first opportunity to consider these issues in the context of an actual variance proceeding and based upon a complete administrative record.

As an additional reason for granting the writ, this Court recently noted, "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *American Textile Manufacturers Institute, Inc. v. Donovan*, ... U.S. ....., ... 101 S. Ct. 2478, 2491 (1981). One of the specific examples given by this Court in that case is the same statute involved here, Section 304(b)(1) of the Clean Water Act, 33 U.S.C. § 1314(b)(1). *Id.* at 2491 n. 30. In granting the variances, the State Board accurately performed the responsibility delegated to it, weighed all of the Section 304(b)(1)(B) factors to be considered, and determined that substantial adverse non-water quality impacts would result from imposition of national effluent limitations and that the total costs (environmental and energy) of application of technology far outweighed the effluent reduction benefits to be achieved. In refusing to accept the State Board's conclusions both EPA and the court of appeals followed a rigid, dogmatic approach that can only be characterized as "treatment for treatment's sake." That approach contravenes the intent of Congress set forth in Section 304(b)(1)(B), and the petition should be granted to correct that error.

Additionally, the issues presented by this case are of national importance about which the courts of appeal are in substantial conflict. The decision below stands in conflict with the decisions of the Fourth Circuit in *Appalachian Power Co. v. Train,* 545 F.2d 1351 (4th Cir. 1976) *("Appalachian I")* and *Appalachian Power Co. v. Train,* 620 F.2d 1040 (4th Cir. 1980) *("Appalachian II")*. Those cases stand for the proposition that all Section 304 factors, including adverse non-water quality environmental impact resulting from strict application of national effluent limitations, and receiving water quality, must be considered by EPA in granting or denying a variance. Clarification of these issues is necessary for future uniformity of administration of the Clean Water Act.

Lastly, an integral part of the Clean Water Act's implementation rests upon the states. Here the State Board fulfilled its responsibilities and made its findings. The Administrator rejected the findings and mischaracterized the State Board decision as based solely on receiving water quality. The court of appeals agreed. The result directly conflicts with *Cleveland Electric Illuminating Co. v. EPA,* 603 F.2d 1 (6th Cir. 1979), which held that EPA must base its review of state action upon the state agency's true rationale, not upon a technically narrow view. Resolution of this conflict on the issue of whether state permitting agencies are to fulfill their obligations under the Act in a meaningful manner or as mere clerical entities is necessary and appropriate.

1. The Opinion Below Contravenes the Language of Section 304(b)(1)(B) and Creates a Conflict Between Circuits, Within the Ninth Circuit and with Decisions of This Court on an Issue of National Significance Which Requires Resolution.

Under the Act, BPT is defined by taking into account a series of factors listed in section 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B), including the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, as well as the non-water quality environmental im-

pacts (including energy requirements). That cost/benefit analysis was clearly intended. *American Textile Mfg. Institute, Inc. v. Donovan, supra,* 101 S.Ct. at 2491 n. 30.

The courts of appeal have repeatedly held that the BPT variance policy must, at a minimum, also permit consideration of these Section 304 factors. *Appalachian II, supra,* 620 F.2d at 1046; *Consolidation Coal Co. v. Costle,* 604 F.2d 239, 243-44 (4th Cir. 1979); *National Crushed Stone Ass'n. v. EPA,* 601 F.2d 111, 124 (4th Cir. 1979); *Weyerhaeuser Co. v. Costle,* 590 F.2d 1011, 1035 (D.C. Cir. 1978); *Appalachian I, supra,* 545 F.2d at 1359-60.

The principle urged by petitioners is therefore very simple, and clearly provided for under the Act and applicable court decisions: The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application (a factor which might be termed "cost/benefit") as well as non-water quality environmental impact, including energy, is to be taken into consideration both at the regulation issuing stage *and* at the permit-issuing stage, where variances from the regulations are determined.

This Court's opinion in *National Crushed Stone, supra,* suggests an identical analysis in indicating that a "recalculation" of the cost/benefit analysis is appropriate when applying BPT limitations to individual point sources to determine if EPA's calculation is incomplete or would lead to unexpected results:

> . . . under § 304, the Administrator is directed to consider the benefits of effluent reductions as compared to the costs of pollution control in determining BPT limitations. Thus, every BPT limitation represents a conclusion by the Administrator that the costs imposed on the industry . . . are worth the benefits in pollution reduction that will be gained by meeting those limits. To grant a variance because a particular owner . . . cannot meet the normal costs of the technological requirements imposed on him, *and not because there has been a recalculation of the benefits compared to*

> *the costs*, would be inconsistent with this legislative scheme and would allow a level of pollution inconsistent with the judgment of the Administrator. 101 S. Ct. at 303 (emphasis added). *See also* 101 S. Ct. at 304.

It is on the propriety of this "recalculation", however, that the circuits diverge, and the Ninth Circuit opinion below erred.

The State Board in this case balanced the total costs of treatment (including environmental and energy costs) against the complete absence of expected pollution reduction benefits and found that variances were justified because, as applied to petitioners' mills, EPA's BPT calculation was incomplete (*e.g.*, it had not considered ocean discharges or petitioners' unique location, and sludge disposal problems) and had an unexpected effect—it resulted in *no* water quality benefits and a net detriment to the environment by the massive pollution which would be created by application of technology required to meet the national guidelines.

The Fourth Circuit would apparently agree with the action taken by the State Board. In *Appalachian I*, industry challenged certain effluent limitations established by EPA on the ground that EPA had ". . . failed to balance the overall social benefits to be derived from its regulations against their social costs." 545 F.2d at 1361. EPA, in turn, contended that it had no such obligation.

Rejecting EPA's position, the court made it clear that consideration of the ecological benefit to be gained from the imposition of effluent limitations is fundamental to the requirements of Section 304 of the Act:

> Even assuming that it might not be possible to articulate with reasonable certainty the achievability of the benefits to be derived from a specified amount of heat removal, it seems to us that the expectancy might be stated, for if there is no expectancy of benefits to aquatic life, is the expenditure of billions of dollars justified under any standard?
>
> Thus in choosing among alternative strategies, EPA must not only set forth the cost of achieving a particular level of

> heat reduction *but must also state the expected environmental benefits, that is to say the effect on the environment, which will take place as a result of reduction . . . .*" 545 F.2d at 1364 (emphasis added).

Appalachian I also explicitly ruled in 1976 that the non-water quality environmental impact factor of Section 304(b)(1)(B) might, in an appropriate case, justify a BPT variance. Three years, and several decisions later, EPA accepted this aspect of *Appalachian I*. 40 C.F.R. §§ 125.30-125.32. It has not, however, permitted *any* consideration of the impact of a discharge on receiving water quality, and it is the erroneous approval of that position by the court below which exacerbates the conflict among circuits, contravenes the intent of Congress expressed in Section 304, and raises a serious constitutional issue.

In *Appalachian II*, the Administrator boldly argued that "[r]eceiving water quality simply cannot legally be considered a relevant factor in evaluating a variance request." 620 F.2d at 1045. The Fourth Circuit responded in blunt fashion:

> *Much as we disagree with the statement*, there has been no application of it in the case before us, and no binding statement has been made to that effect by the Administrator. We will have to await a proper case to see if the Administrator in actual practice, or in the administration of the statute, takes the same extreme position his attorneys do in the brief in this case. 620 F.2d at 1046 (emphasis added).[7]

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7. Subsequent to the Fourth Circuit's decision in *Appalachian II*, and after the veto involved here, EPA made the position taken by its attorneys in that case unequivocally EPA's own, by stating in its variance regulations that a variance request shall not be granted on the basis of "[t]he impact of a discharge on local receiving water quality." 40 C.F.R. § 125.31(e)(4) Accordingly, the issue of whether it is appropriate to consider expected environmental benefits in a variance proceeding is once more pending before the Fourth Circuit in *Appalachian Power Co. v. Train*, No. ..... A decision by this Court in the instant case may assist the Fourth Circuit in resolving this question.

That "proper case" is squarely presented by the facts of this case. The Court in *Appalachian II* said further:

> "To determine whether or not progress is reasonable, we repeat, it may be appropriate to consider water quality as a factor, that is to say as an item of evidence [in granting a variance]. Its sought-for arbitrary exclusion by EPA is simply too rigid a construction of the statute, and we do not believe it is justified. To hold otherwise ultimately can only result in regulation for regulation's sake, at which point, of course, a serious question of constitutional limitations would arise. We believe this useful statute deserves better treatment. 620 F.2d at 1046.

The opinion of the Ninth Circuit in this case is in direct conflict with these Fourth Circuit opinions. The court below said:

> The opinion of the Administrator persuasively argues that to base effluent limitations or variances from these limitations on local water quality considerations would be inconsistent with the Act and its legislative history. 642 F.2d at 326.[8]

The District of Columbia Circuit, in *Weyerhaeuser, supra,* is also in direct conflict with the Fourth Circuit by holding that EPA need not consider water quality in setting its limitations, 590 F.2d at 1044, although that court did not have before it the question of the propriety of EPA's application or interpretation of the variance clause in specific cases.

Incongruously, the opinion below is also directly inconsistent with another decision of the Ninth Circuit itself. In *Association of Pacific Fisheries v. EPA,* 615 F.2d 794 (9th Cir. 1980), the Ninth Circuit was called upon to consider whether EPA had acted prop-

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8. Because the Act itself, when fairly read, quite plainly requires consideration of expected environmental benefit from treatment in relation to its total cost, both EPA and the Ninth Circuit have relied principally on legislative history to support their views. Legislative history, of course, must be used with some caution. Petitioners also can and have pointed to substantial legislative history which fully supports their view of the Act.

erly when it based a BPT effluent limitation solely on water quality considerations. Starting from the proposition that

> We think it plain that, as a general rule, *the EPA is required to consider the costs and benefits* of a proposed technology in its inquiry to determine the BPT [guidelines] . . . . 615 F.2d at 805 (emphasis added),

the court upheld EPA's action in setting BPT guidelines not on technology standards, but solely on the basis of the quality of the receiving waters. Apparently, consideration of water quality conditions and benefits to be expected from treatment is appropriate when the EPA is considering the establishment of effluent limitations pursuant to Section 304 factors, but inappropriate when those *identical* factors are applied by an authorized State agency in the context of a variance application. The inconsistency between the Ninth Circuit's decision in *Pacific Fisheries* and the instant case is particularly anomolous because many of the same environmental facts were involved.[9]

In summary, the decision of the court below prohibits the permit issuer from considering the expected effluent reduction

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9. In *Pacific Fisheries,* EPA had issued BPT guidelines for seafood processors which required them to transport fish waste some distance offshore for ocean dumping. EPA's approach did not either require or necessarily result in a reduction in the amount of effluent discharged, but simply relocated the waste from near-shore waters to deeper waters—such as those into which petitioners discharge—under the justification of resulting environmental benefits. Petitioners cannot help but note the irony presented by EPA's position in *Pacific Fisheries.* In setting BOD control technology for the seafood processing industry, EPA relied upon the same "receiving water quality" factors that the State Board relied upon in this case in its original recommendation of the site and outfall locations for petitioners' mills, and which the Board found, in ruling upon petitioners' variance requests, meant that BOD and pH are simply not pollutants. The only environmentally acceptable BPT requirement for Alaskan fisheries, given the excessive environmental costs of treatment, was direct offshore discharge. EPA recognized this in its seafood processing guidelines. However, since petitioners have the only two mills in their industrial category which have ocean discharges, EPA looked to other means of control in adopting general guidelines for petitioners' industrial category.

benefits of treatment in relation to the total cost of treatment in determining whether a variance from EPA's BPT guidelines is appropriate. That decision directly conflicts with *Appalachian I, Appalachian II,* and *Association of Pacific Fisheries v. EPA, supra.*

This petition should be granted to resolve these conflicts, to clarify the scope of Section 304(b)(1)(B), and to implement this Court's decisions in *duPont, supra,* where the Court required flexibility in the variance procedure, and in *National Crushed Stone, supra,* where the Court suggested that the variance mechanism must involve a balancing of the effluent reduction benefits resulting from treatment in relation to the total cost of such treatment.

2. The Opinion Below Usurps the Role of States in Administering the Clean Water Act and Is in Conflict with Decisions of Other Circuits Because It Fails to Give Due Deference to the State.

The essential role played by the states under the Act was recognized in *Cleveland Electric Illuminating Co. v. EPA, supra,* which held that EPA must give due regard to the findings of a state agency authorized to issue NPDES permits. *Cleveland Electric* ruled that an authorized state agency need not even frame its action as the grant of a "variance," much less adopt express findings of "fundamental difference." In reversing EPA's veto of a state granted variance, the court held that EPA's rejection of a variance on the ground that the findings of the state agency did not adhere precisely to the language of the variance clause was arbitrary and capricious and contrary to the decision in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971).[10]

10. The court held:
When U.S. EPA acted on the Ohio EPA proposal there was no variance procedure for electric generating units because 40 C.F.R. § 423.12(a) as adopted in 1974 had been set aside in *Appalachian Power Co., supra,* and no replacement had been adopted. The effect of the Ohio EPA proposed permit was to grant a variance based on plant-specific factors. *In its brief before this court U.S. EPA argued that since Ohio EPA did not make any explicit finding that*

The D.C. Circuit in *Weyerhaeuser, supra,* reached the same conclusion as the *Cleveland Electric* court. Referring to this Court's opinion in *duPont, supra,* the D.C. Circuit said:

> Finally, the Court emphasized the need for a meaningful variance when it argued that giving EPA the power to set general regulations would not undermine the Act's intent to give the states, through the permit-granting agencies, an important role in administering the Act. The Court subscribed to the view that, by leaving the granting of variances to the state agencies in the first instance, the significance of their role would be preserved [citations omitted].
>
> Because the states can only grant variances that conform to EPA's interpretation of its variance provision, [citation omitted] the states' role could still be severely undercut if the Agency were to interpret the variance allowance so narrowly as to remove its effect. 590 F.2d at 1034.

The opinion below, in adopting EPA's position, presents the same issue of form over substance addressed in *Cleveland Electric* and results in the very same undercutting of the states' role feared by the court in *Weyerhaeuser.*

Deference to the role of the State Board is particularly appropriate where, as here, the State Board was required to act upon a variance application without the benefit of EPA's detailed variance

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fundamentally different factors existed at CEI's plants, U.S. EPA was not required to consider its factual findings and orders. We believe that U.S. EPA failed to consider all of the relevant factors and committed a clear error of judgment. Citizens to Preserve Overton Parks, supra. Under a statutory scheme which gives initial authority to a state agency, subject to approval of its recommendations by a federal agency, considerations of comity require the reviewing agency to consider the findings of the initiating agency. This arbitrary determination by U.S. EPA is completely unsupportable, particularly in view of the finding of the court of appeals in *Appalachian Power Co.* that the 'fundamentally different factors' requirement is 'unduly restrictive.' 603 F.2d at 6-7 (emphasis added).

regulations, which were not published until some years after the State Board acted. When the State Board granted the variance in March of 1977, the only standard it had to look to was that contained in the variance clause itself (40 C.F.R. § 430.72), which simply said that a variance may be granted based upon evidence "that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines." Putting the semantics of its decision aside, it is quite clear that taking all relevant 304 factors into account, the State Board found that application of EPA's BOD and pH limitations to petitioners' mills resulted in a fundamentally different situation than that contemplated by EPA—*no* environmental benefit to the nation's waters and a concommitant environmental and energy *loss*. In addition, some of the factors relating to petitioners' mills considered by the State Board are not to be found in EPA's Development Document for the BPT guidelines. However, both the Ninth Circuit and EPA ignored the substance of these findings by a responsible state agency. Instead, the opinion below would require that the State Board frame its findings of "fundamental differences" in a more particular fashion as *now* contemplated by EPA's *subsequently issued* regulations.

Had EPA's more recent regulations been available to the State Board, it might very well have phrased its decision in a manner more to the liking of EPA and the Ninth Circuit. The unavailability of these regulations to the State Board at the time of its decision requires even greater deference to its decision than might otherwise be the case, as *Cleveland Electric Illuminating Co.* and *Weyerhaeuser* held. Yet the Ninth Circuit, in conflict with these decisions, failed to give any deference whatsoever to the State Board's findings.

This failure to defer places the Ninth Circuit in conflict with the Sixth Circuit and the District of Columbia Circuit. Moreover, it reduces the role of the State Board to a mere clerical functionary. This Court should grant the petition, resolve that conflict and restore the role of state permitting agencies in the manner intended by Congress.

3. The Opinion Below Fails to Follow This Court's Intended Application of duPont and Conflicts with Decisions of Other Circuits Which Require a Flexible Variance Mechanism.

In *duPont, supra,* this Court considered, *inter alia,* the issue of whether the EPA could establish regulations for classes of plants, or whether limitations must be set for each plant on an individual basis during the permit-issuance process. This Court held that industrywide regulations were appropriate only "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." 430 U.S. at 128. This Court was affirming in pertinent part the decision of the Fourth Circuit in *E. I. duPont de Nemours & Co. v. Train,* 541 F.2d 1018, 1028 (4th Cir. 1976), where that court said: "Provisions for variances, modifications, and exceptions are appropriate to the regulatory process." In *Appalachian I,* the Fourth Circuit stated:

> As we noted in *duPont* [*supra*], provisions for variances are appropriate to the regulatory process. This is particularly so in the case of [EPA § 301 effluent] regulations having presumptive applicability throughout the nation. 545 F.2d at 1358-59.

The Second Circuit has also declared, in light of the complexity of the area to be regulated and the stringency of the congressional requirements, that "[i]n the context of the Federal Water Pollution Control Act Amendments the variance provision is peculiarly appropriate," *Natural Resources Defense Council,*

Inc. v. EPA, 537 F.2d 642, 647 (2d Cir. 1976), and that "[w]ithout variance flexibility, the [FWPCA] program might well flounder on the rocks of illegality." *Ibid.*

Clearly, the extreme stringency and potential for excessive rigidity of the EPA's BPT guidelines demands a flexible variance provision. By those guidelines, EPA sets standards presumptively applicable to all dischargers in an industry category, often without considering the specific circumstances of more than a handful of such dischargers. The opinion below fails to follow the mandate of *duPont* requiring flexibility. While the Ninth Circuit professed that "[o]ur holding does not deprive the Act or industry of a meaningful variance provision or the states of a significant role in administering the Act" (642 F.2d at 327), the court did just that when it refused to permit a State Board to consider, in a variance proceeding, the most fundamental of the § 304 factors — the total cost of application of technology in relation to the expected environmental benefit. Instead, the Ninth Circuit has limited the permissible inquiry to the cost side of the equation. Instead of the balancing contemplated by Section 304, instead of the "recalculation" of the cost/benefit analysis suggested in *National Crushed Stone, supra*, the opinion below results only in a comparison of cost assumptions. It does not permit any comparison of effluent reduction benefits sought to be achieved because such comparison involves consideration of receiving water quality. Yet, Section 304, as well as common sense, dictate that effluent reduction benefits must include such a consideration. The opinion below, in effect, rewrites Section 304(b)(1)(B). The result, when applied to the facts of this case, entirely loses sight of the overall objective desired by Congress—a better environment. Instead, it debits one environmental account with substantial increased pollution and energy needs without any corresponding credit. The petition should be granted to restore responsibility in the regulating scheme.

4. This Case Presents an Issue of National Importance in an Area of Law Not Previously Considered by This Court.

In its decision in *duPont, supra,* this Court held that while a BPT variance mechanism was required, consideration of its proper scope was premature until the question arose in a claim for a variance in a permit application. 430 F.2d at 128 n. 19. In *National Crushed Stone, supra,* 101 S. Ct. at 195 n. 12, this Court held ripe for review a narrow challenge to an identical variance clause applicable to certain segments of the mining industry because the EPA had definitely stated its position that economic capability would not be a ground for a variance.

However, the Court still has not reviewed the proper scope of the variance clause in the context of a completely documented factual situation. The variance clause at issue here is identical to the variance clauses applicable to all other industries regulated by effluent limitations—regulations which control the discharges of thousands and thousands of industrial plants throughout the country—and which are presently before at least the Fourth Circuit in the continuing *Appalachian Power* litigation referred to in note 7, *supra.* This case, with a detailed administrative record, presents this Court with a unique opportunity to decide an issue of national importance on which the circuits are divided, and to provide future guidance for all permit-issuers considering variance applications.

CONCLUSION

The opinion below, and its wholesale approval of the EPA veto, emasculates the concept of variances mandated by *duPont* and *National Crushed Stone,* and eviscerates the variance clause promulgated for 1977 BPT limitations. The opinion is not only environmentally unsound because it requires treatment for treatment's sake, but is squarely in conflict with other courts of appeal as to the factors which may be considered in evaluating variance

requests and as to the significant role of states in administering NPDES permits. Lastly, the opinion below subverts the congressional objectives of preserving the role of states and requiring application of the Section 304 cost/benefit analysis because it prevents an authorized state agency from balancing non-water quality environmental and other harms against a complete, *undisputed*, absence of environmental benefit. These issues are important and of national concern, and require clarification. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 10, 1981

Appendix A

In the
United States Court of Appeals
For the Ninth Circuit

No. 76-3161

CROWN SIMPSON PULP COMPANY,
Petitioner,

vs.

DOUGLAS M. COSTLE (formerly Russell E. Train), As Administrator, Environmental Protection Agency,
Respondent.

No. 76-3287

LOUISIANA-PACIFIC CORPORATION,
Petitioner,

vs.

DOUGLAS M. COSTLE (formerly Russell E. Train), As Administrator, Environmental Protection Agency,
Respondent.

No. 77-3322

CROWN SIMPSON PULP COMPANY and LOUISIANA-PACIFIC CORPORATION,
Petitioners,

vs.

DOUGLAS M. COSTLE, As Administrator, Environmental Protection Agency,
Respondent.

Petitions to Review Decisions of the Environmental Protection Agency

OPINION

Before DUNIWAY, CHOY AND SNEED, Circuit Judges.

DUNIWAY, Circuit Judge:

Crown Simpson Pulp Company and Louisiana-Pacific Corporation petition for review of the decision of the Environmental

Protection Agency (EPA) to veto two pollutant discharge permits that the California State Water Resources Control Board proposed to issue to the Companies. The proposed permits would grant the Companies variances from two EPA effluent limitations. In *Crown Simpson Pulp Co. v. Costle*, 9 Cir., 1979, 599 F.2d 897, we dismissed these cases for lack of jurisdiction. The Supreme Court reversed, finding jurisdiction under § 509(b)(1)(F) of the Federal Water Pollution Control Act Amendments of 1972 (the Act), 33 U.S.C. § 1369(b)(1)(F), and remanded the case to us for further proceedings. *Crown Simpson Pulp Co. v. Costle*, 1979, 445 U.S. 193, 100 S.Ct. 1093, 63 L.Ed.2d 312. Reaching the merits, we now affirm the agency's action.

I. *The Facts.*

Because we have already described the facts and relevant statutory provisions in this case in our earlier decision, 599 F.2d at 899-900, we sketch them only briefly here. Further description of the statutory scheme can be found in *EPA v. National Crushed Stone Association*, 1980, ... U.S. ...., 101 S.Ct. 295, 66 L.Ed.2d 268; *E.I. du Pont de Nemours & Co. v. Train*, 1977, 430 U.S. 112, 97 S.Ct. 965, 51 L.Ed.2d 204; *Weyerhaeuser Co. v. Costle*, D.C.Cir., 1978, 590 F.2d 1011.

The Companies operate two bleached kraft pulp mills located on the Samoa Peninsula, on the west side of Humboldt Bay in California. Each mill discharges effluent into the Pacific Ocean through a separate deepwater outfall diffuser system designed in consultation with the State. In February, 1976, acting under Section 301(b) of the Act, 33 U.S.C. § 1311(b), the EPA issued effluent limitations for different types of bleached kraft pulp, paper and paperboard mills discharging into navigable waters. 40 C.F.R. part 430, subparts F-I. As required by this section of the Act, these regulations impose discharge limits, for the period July 1, 1977 to July 1, 1983, based on "the application of the best practicable control technology currently available as defined by

the Administrator." The regulations also include a provision for a variance from the discharge limits where the discharger demonstrates that "factors relating to the equipment or facilities involved, the processes applied, or other such factors related to such discharger are *fundamentally different* from the factors considered in the establishment of the guidelines." *See, e. g.,* 40 C.F.R. § 430.62. (emphasis added).

In March, 1977, the California State Water Resources Control Board—an agency approved by the EPA under § 402(b) of the Act, 33 U.S.C. § 1342(b) to grant discharge permits—proposed to issue discharge permits to the Companies that included variances from two of the effluent limitations set by the EPA guidelines for bleached kraft pulp mills. Under § 402 of the Act, 13 U.S.C. § 1342, all dischargers must obtain such discharge permits to continue discharging, and permits are granted only to dischargers who either conform to EPA's effluent limits or merit a variance.

Subject to the approval of the Administrator of EPA, the State Board granted variances to the Companies from EPA guidelines for biochemical oxygen demand of effluent (BOD)—"The BOD of a waste exerts an adverse effect upon the dissolved oxygen resources of a body of water by reducing the oxygen available to fish, plant life, and other aquatic species," *In re Louisiana-Pacific Corp.,* 1977, 10 E.R.C. 1841, 1845 (citation omitted)—and for the pH, e. g., acidity or alkalinity, of effluent. The State Board concluded after several days of hearings that the non-water quality environmental effects of adhering to these guidelines—adherence to the EPA guidelines for BOD and pH would require construction and operation of a treatment facility—outweighed the water quality benefits. It said: ". . . the existing discharges result in no water quality problems . . . there is no expected or predictable water quality improvement to be achieved as the result of imposition of the EPA Guidelines. In light of . . . the magnitude of the chemical and energy requirements, and the

potential air and land management problems associated with sludge disposal . . . we can only conclude the evidence justified the variance requested." *In re Louisiana Pacific Corp., supra,* 10 E.R.C. at 1850. Accordingly the State Board proposed to grant permits to the Companies, authorizing limits of BOD and pH far above those set in EPA's guidelines.

In a lengthy decision issued September 15, 1977, the Administrator vetoed the permits and denied the variance requests. *In re Louisiana-Pacific Corp., supra.* The Administrator emphasized that the State Board had not found—as the variance provision required—that the non-water quality environmental effects of adherence to the limitations in this case were "fundamentally different" from those considered by EPA in publishing effluent limitations for the industry as a whole: "It is clear that the Board did not find a 'fundamental difference' in terms of non-water quality impact itself but instead found non-water quality impact to be significant *because of lack of improvement of local receiving water quality.* In effect, the State granted an exemption from minimum national technology-based standards because of local water quality considerations. This was contrary to the letter and intent of the [Act] and I have no choice but to disapprove the state action." 10 E.R.C. at 1844. (emphasis in original). The Companies petition for review of EPA's decision.

II. *The Merits.*

To begin with, we note that the issue in this case is not whether a variance may be granted because of such factors as the non-water environmental effects of adherence to the general effluent limitations. The agency has now explicitly stated, both in its opinion in this case as well as in more recent regulations, 40 C.F.R. §§ 124.30-125.32, that the factors which the agency must consider under § 304(b)(1), 33 U.S.C. § 1314(b)(1), in determining the standard of best practicable technology will also be considered by

the agency in deciding whether a plant is fundamentally different and thus whether a variance is appropriate. These factors include non-water quality environmental impact, energy requirements, and cost in relation to effluent reduction benefit as well as several other factors.

Nor is the issue whether the agency must insist that a particular discharger show a "fundamental difference" in his plant as to one or more of the factors considered by EPA in setting the guidelines for the industry category before granting a variance. The Companies do not challenge the fundamental difference requirement and it has been upheld explicitly in *Weyerhaeuser Co. v. Costle, supra,* 590 F.2d at 1040, a case to which Crown Simpson was a party, as well as implicitly in the recent opinion in *EPA v. National Crushed Stone Association,* 1980, ... U.S. ...., 101 S.Ct. 295, 66 L.Ed.2d 268 (Dec. 2, 1980).

Rather, the issue is whether, in insisting that a particular discharger show a "fundamental difference" in his plant before granting a variance, the agency must consider receiving water quality as a factor that may make a fundamental difference—either in itself or because other factors may be considered fundamentally different when assessed in the light of receiving water quality. Thus, the Companies contend that a variance must be granted where the non-water environmental costs of adherence to the guidelines are high—although not "fundamentally different"—*and* the benefits of adherence to the receiving water are apparently negligible. We disagree.

In granting a variance on the basis of non-water quality environmental effects viewed in the light of receiving water quality, the State Board nowhere found that the non-water environmental effects of adherence to EPA's guidelines would be "fundamentally different" for these two companies' plants as opposed to others in the industry. This was not simply a failure by the State Board to make itself clear. The State Board fully understood the requirement: It rejected the Companies' claim that their costs of adherence

justified a variance by finding that these costs were not "substantially different from the costs EPA found would be sustained on an industry-wide basis." Moreover, one of the Companies' own witnesses gave testimony to the State Board specifically denying any fundamental difference as to non-water quality environmental impact:

> Q. How does your plant compare in the area of non-water quality environmental impacts with the plants that EPA utilized in developing the guidelines?
>
> A. I don't think there's that much difference. 10 E.R.C. at 1853 n.29.

His answer applied to the mills of both Companies.

Thus, we reject the Companies' suggestion that the State Board found a fundamental difference as to non-water quality environmental impact in substance and merely failed to enunciate the exact words or that receiving water quality played only a subsidiary part in the Board's decision to grant variances. To the contrary, it is clear from the State Board's opinion that it would not have granted the variances except for its consideration of receiving water quality. And it was because of this heavy reliance on receiving water quality that the Administrator felt compelled, in view of his interpretation of the Act, to disapprove the variances. It is thus upon this interpretation of the Act that the dispute hinges.

When faced with a problem of statutory construction, "[we show] great deference to the interpretation given the statute by the officers or agency charged with its administration." *EPA v. National Crushed Stone Association, supra,* 101 S.Ct. at 307, quoting *Udall v. Tallman,* 1965, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616. The opinion of the Administrator persuasively argues that to base effluent limitations or variances from these limitations on local water quality considerations would be inconsistent with the Act and its legislative history. 10 E.R.C. at 1846-50. Judge McGowan's enlightening opinion in *Weyerhaeuser Co.*

v. Costle, supra, reached the same conclusion, finding "that based on long experience, and aware of the limits of technological and administrative flexibility, Congress made the deliberate decision to rule out arguments based on receiving water quality." 590 F.2d at 1042. Similarly, we stated in *Association of Pacific Fisheries v. EPA,* 9 Cir., 1980, 615 F.2d 794, 805, that "We agree with the Agency's contention that Congress intended BPT [Best Practicable Control Technology] standards to be based primarily on employment of available technology for reducing effluent discharge, and not primarily on demonstrated changes in water quality." *See Pacific Legal Foundation v. Quarles,* C.D.Cal., 1977, 440 F.Supp. 316, 326, *affirmed Kilroy v. Quarles,* 9 Cir., 1980, 614 F.2d 225.

We need not repeat here the exhaustive discussions of the legislative history of the Act provided by the Administrator's decision and by the court in *Weyerhaeuser Co. v. Costle, supra.* These discussions demonstrate that a fundamental purpose of the Act was to shift pollution control from a focus on receiving water quality to a focus on the technological control of effluent. *See EPA v. State Water Resources Control Board,* 1976, 426 U.S. 200, 204-05, 96 S.Ct. 2022, 2024-25, 48 L.Ed.2d 578. Above all the Act seeks to "avoid imposing on the Administrator any requirement to consider the location of sources w' hin a category or to ascertain water quality impact of effluent controls." *Weyerhaeuser Co. v. Costle, supra,* 590 F.2d at 1045 n.52 (quoting Senator Muskie). We therefore affirm the agency's decision that the State Board erred in proposing a variance for reasons relating to receiving water quality. Without finding a fundamental difference as to any factor or combination of factors considered by EPA in setting effluent limitations for the industry category, the State Board could not, consistently with the Act, grant variances on the basis of receiving water quality. *See Consolidation Coal Co. v. Costle,* 4 Cir., 1979, 604 F.2d 239, 244-45.

Our holding does not deprive the Act or industry of a meaningful variance provision or the states of a significant role in administering the Act. Under EPA regulations variances have been granted, and are appropriately granted, by the state or EPA when a discharger's plant is substantially or fundamentally different as to those factors considered by the EPA in drawing up the guidelines. Indeed, in his opinion in this case, the Administrator took care not to foreclose the possibility of a future variance for the two companies here, and emphasized the continuing importance of the State Board in the variance and permit process: "I . . . express no opinion as to whether the two mills could be found fundamentally different in terms solely of non-water quality environmental impact. This is a matter properly addressed in the first instance by the State. . . . There is no reason why, in a proper case, a fundamental difference in non-water quality environmental impact could not justify a variance." 10 E.R.C. at 1853 n.30. To rule out variances granted in large measure because of receiving water quality merely requires that the states or EPA grant variances in accordance with the basic purpose of the Act; it does not put an end to variances or to the state's role in granting them.

Our holding in this case is consistent with our decision in *Association of Pacific Fisheries v. EPA, supra,* 615 F.2d at 794. In *Pacific Fisheries* we upheld EPA's issuance of permits to certain Alaskan fish processors. The best practicable control technology for these processors was determined to be the installation of screens to strain out larger fish particles from the plant's discharge. The permits issued to certain of these processors allowed, among several methods of disposal, the barging and dumping of screened-out solids at certain offshore ocean sites. EPA had not considered water quality in categorizing the industry or in setting effluent limitations for each category. It considered water quality only in issuing certain permits. Plaintiff did not challenge EPA's consideration of water quality in issuing permits but argued that if

barging and dumping were permissible so too should grinding and dispersion of effluent be permissible.

Although noting that "[t]he Agency has not explained to this court as clearly as it might have how the asserted water quality benefits of discharging a given amount of effluent farther offshore should be considered within the statutory framework of technology-based, not water quality-based, pollution limitations," we held that "[i]t was not an abuse of discretion for the Agency to consider an improvement in nearshore water quality as one factor in support of the effluent limitation." 615 F.2d at 807. We found specific support in the legislative history for a limited consideration of water quality in framing effluent standards for the Alaskan fish processing industry.

We certainly did not hold in *Pacific Fisheries*, as the Companies appear to contend, that the agency *must* consider water quality in framing effluent guidelines. Indeed, we explicitly affirmed the D.C. Circuit's position that the Act seeks to reduce pollution by technology based standards and not by standards based on receiving water quality. Thus, we only permitted a limited consideration of receiving water quality in an unusual factual setting.

Moreover, we explicitly declined to decide "the extent to which, if the EPA relies on water quality evidence in measuring the benefits of requiring a particular technology for a category or subcategory of point sources, it must also consider water quality evidence at particular sites in passing on applications for variances." 615 F.2d at 807 n.9. Here, EPA did not rely on water quality evidence and thus the question posed but not answered in *Pacific Fisheries* need not be answered here. We also note, as we did there, that a fundamental purpose of the Act was to free EPA from the incubus "of proving in every case the application of an effluent limitation at a specific site will improve water quality at that site." 615 F.2d at 807 n.8. Thus, even if EPA could base industry guidelines to a limited degree on local water quality considerations, if we were to permit companies to seek

variances from these guidelines on the basis of water quality at particular sites, we would be returning water pollution control to its ineffective pre-1972 status in defiance of Congress's desire "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

In short, our decision in *Pacific Fisheries* has not suddenly rehabilitated the discredited approach of water quality based pollution control. The Administrator's holding that the Act does not permit either the industry-wide guidelines or variances to be based solely or in large part on local water quality considerations is not inconsistent with our *Pacific Fisheries* opinion.

Finally, the Companies argue on the basis of *Costle v. Pacific Legal Foundation*, 1980, 445 U.S. 198, 100 S.Ct. 1095, 63 L.Ed.2d 329, that *if* any material issues of fact were present further hearings should have been provided before the Administrator decided. However, the Companies do not contend that there were any such issues, and the Administrator accepted all of the State Board's factfindings for purposes of his opinion. We need not consider the merits of the Company's claim that a hearing would be required in different circumstances.

The decision of the Administrator is affirmed.

Appendix B

FILED
JUL 31 1981
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

Nos. 76-3161
Nos. 76-3287
Nos. 77-3322

CROWN SIMPSON PULP COMPANY;
LOUISIANA-PACIFIC CORPORATION,
Petitioners,

vs.

ANNE M. GORSUCH (formerly DOUGLAS M. COSTLE), as Administrator, ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ORDER

The motion of petitioners to recall and stay the mandate in this case is granted and the mandate is hereby recalled.

Reissuance of the mandate is stayed pending the filing by the petitioners of a petition for a writ of certiorari in the Supreme Court. If a petition is not filed within the time authorized by law, the stay hereby granted will terminate. If such a petition is filed within the time allowed by law, the stay will continue until the Supreme Court acts upon the petition either by denial, or by a decision in the matter if the petition for a writ of certiorari is granted.

BEN C. DUNIWAY
United States Circuit Judge

Appendix C

IN RE LOUISIANA-PACIFIC CORPORATION

Environmental Protection Agency

IN THE MATTERS OF LOUISIANA-PACIFIC CORPORATION, NPDES NO. CA0005894 and CROWN SIMPSON PULP COMPANY, NPDES NO. CA0005882, September 15, 1977

Two companies request variances from best practicable technology effluent limitations.

Requests denied.

Full Text of Opinion

Decision of the Administrator

I have been asked to consider the granting of variances from effluent limitations guidelines for two pulp, paper, and paperboard mills located on the Pacific Coast of California. The requests for variances are denied.

I. *Procedural Background*

On March 29, 1977, Mr. Bill B. Dendy, Executive Officer of the State Water Resources Control Board for the State of California, submitted extensive materials concerning the actions taken before the California Regional Water Quality Control Board, North Coast Region, and before the State Board itself, with respect to these two mills. A list of the enclosures to that March

29 letter appears in the margin.[1] Mr. Dendy noted in his March 29 letter that the "state board finds that a variance is warranted for the two dischargers . . . on the grounds that the environmental benefits (if any) to be derived from the application of the treatment required to meet the guideline limitations for BOD and pH would be far outweighed by the non-water quality environmental costs including use of energy." Mr. Dendy went on to say that he believes "that variance based on these grounds is in accordance with the precedents established in the decisions of several U.S. Court of Appeals, particularly the Fourth Circuit's decision of the case of *Appalachian Power v. Train* [545 F.2d 1351 [9 ERC 1033] (1973)]."

On May 26, 1977 Mr. G. William Frick, EPA General Counsel, issued a Recommended Decision of the Administrator which recommended denial of the variance requests of the two com-

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1. A. State Board Order No. WQ 77-6 (with exhibits thereto).
B. Transcript of hearing before the State Board, December 22, 1976.
C. Transcript of hearing before the Regional Board, July 29, 1976.
D. Transcript of hearing before the Regional Board, August 26, 1976.
E. "Written Comments on Tentative Orders" presented to the Regional Board July 21, 1976.
F. "Request for Variance in EPA Limitations on the Basis of Fundamentally Different Factors" dated June 21, 1976.
G. Written Statement of Dr. Herman R. Amberg before the California Regional Water Quality Control Board, North Coast Region, July 19, 1976.
H. "Written Comments on Tentative Wastes Discharge Orders" dated December 1976.
I. Interoffice Memorandum from John R. Hannum to D.C. Joseph and Gary Grimm dated December 13, 1976.
J. "Non-water Quality Environmental Impacts" calculation by Dr. Amberg; presented at State Board Hearing, December 22, 1976.
K. Letter from Dr. C. Edward Taylor to Mr. W. Don Maughan dated January 13, 1977.
The two companies have commented that this list does not include certain documents which were before the State during its proceedings. However, they do not argue that the documents are vital to this decision nor have they taken the opportunity afforded by the notice and comment procedure to make any such materials available to me. Under the circumstances, and given the purely legal nature of my decision, I see no need to amplify the record.

panies. 42 *Fed. Reg.* 28167-72 (June 2, 1977). The preamble to the recommended decision advised that written comments on the decision could be submitted and that all such comments received by July 5, 1977 would be considered prior to issuance of a final decision of the Administrator. Comments were timely filed by Crown Simpson Pulp Company and Louisiana-Pacific Corporation (joint submission), the law firm of Hunton & Williams (on behalf of the Utilities Water Act Group and other petitioners in *Appalachian Power Co. v. Train*), Southern California Edison Company, East Bay Municipal Utility District and the National Wildlife Federation.

In reviewing the submissions by the State of California and the extensive materials, including legal briefs, submitted by the Louisiana-Pacific Corporation and the Crown Simpson Pulp Company to the State as well as the comments on the recommended decision, I have assumed for the purpose of the opinion as factually accurate the statements by the State and the industry as to the essential nature of operations at these facilities, the water quality effects of the discharges, the energy impact, the cost of application of the technology which would be required to meet EPA's national limitations, and other major relevant facts. The Environmental Protection Agency has conducted no independent review of the facts following the submission of the requests for variances. In other words, the record of the State Board hearing as submitted by Mr. Dendy with the addition of the Development Document for the effluent limitations guidelines applicable to these mills, constitutes the record which I have reviewed. While the Development Document was not formally forwarded to me as part of the record, I note that it is referred to repeatedly in the various materials which are part of the record, including the opinion and order of the State Board, and it is therefore properly before me.

As I discuss in more detail below, the issues which are to be resolved in these variance requests are solely legal, and do not

require an independent analysis or weighing of facts. This is not to say, however, that in other variance requests it would not be appropriate to conduct factual reviews.[2]

The Crown Simpson Pulp Company and the Louisiana-Pacific Corporation each operate bleached kraft pulp mills on the Samoa Penninsula, on the west side of Humboldt Bay, near Eureka, California. Louisiana-Pacific also operates a plywood mill at this location. Each mill produces about 600 air dry tons per day of bleached kraft pulp; the Louisiana-Pacific saw mill also produces about 500,000 board feet per day of lumber. Each mill principally discharges through separate ocean outfalls about 2500 feet from shore and at a depth of approximately 30 to 40 feet. The outfalls are about one mile apart, and each has a diffuser at the end.

On December 4, 1974 the Regional Board of the California Water Resources Control Board adopted waste discharge requirements for these dischargers; at that time national effluent limitations guidelines for these sources were not available. EPA Region IX objected to the Regional Board orders on the grounds that the Regional Board failed to implement the provisions of Sections 301 and 304 of the Federal Water Pollution Control Act by not imposing effluent limitations in those orders which would require achievement of best practicable control technology currently available by July 1, 1977. The State Board reviewed

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2. Crown Simpson and Louisiana-Pacific complain of the lack of an opportunity for a hearing before me, arguing that such a hearing is required by law. But the companies were given extensive opportunity for hearings by the State and an opportunity to comment upon the General Counsel's recommended decision. I have not augmented the record compiled by the State nor have I independently evaluated the factual conclusions reached below. A hearing, particularly of the nature apparently envisioned by the two companies in which they would "respond to [my] questions concerning the voluminous record in the . . . proceedings before the State . . ." would be a useless exercise. I have carefully considered the arguments made by the companies concerning the legal issues involved in this proceeding. I am convinced that the procedures I have used have been fair and entirely adequate and that all process "due" has been provided.

the regional orders and, after a hearing on March 7, 1975, remanded the orders to the Regional Board with directions that effluent limitations based on best practicable control technology, or "BPT", be included. These BPT limitations were to be based on promulgated national regulations if available, otherwise the Regional Board was directed to establish the numbers based on its best judgment as to what constituted BPT.

On February 19, 1976, EPA promulgated interim final effluent limitations guidelines for the bleached kraft sector of the pulp, paper and paperboard point source category. 40 CFR Part 430 Subparts F-I. EPA issued final amendments to these regulations on January 6, 1977. The validity of the national regulations is not at issue in this variance proceeding.[3] Each national limitation contains a variance clause[4] which in essence provides that a discharger may submit evidence that factors such as the age or size of plants, raw materials, manufacturing processes, treatment technology available, energy requirements or other such factors, are

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3. The regulations are being challenged in *Weyerhaeuser Company, et al. v. Train*, No. 76-1674, et al. before the United States Court of Appeals for the District of Columbia Circuit. See footnote 5, *infra*.

4. For example, Section 430.72 reads in part as follows:
In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry sub-categorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such

fundamentally different from the factors considered during the establishment of the national effluent limitations guidelines.[5]

In accordance with the instructions from the State Board, the Regional Board conducted hearings with respect to these two mills, on June 24, July 29, and August 26, 1976. The discharge restrictions for Crown Simpson and Louisiana-Pacific established by the Regional Board did not follow the EPA national effluent limitations guidelines. On September 3, 1976, EPA Region IX issued a letter of objection to the Regional Board orders, noting that the Regional Board had in effect granted variances from the national limitations without submitting the matter to the Administrator of EPA for approval. This action by EPA prompted the two mills to seek review in the United States Court of Appeals for the Ninth Circuit (Nos. 76-3161 and 76-3287). Those actions have been stayed pending decision on this matter.

On October 21, 1976 the State Water Resources Control Board adopted resolution 76-108 to review the action of the Regional Board with respect to these two mills. On December 22, 1976, the State Board held a hearing, and on March 17, 1977, the Board issued its opinion.

The Board ordered that the Regional Board Orders No. 76-133 and 76-134 be set aside and replaced by the permits established by the State Board. It granted the requested variances from the effluent limitations guidelines for BOD and pH, subject to ap-

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evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations or initiate proceedings to revise these regulations.

5. Crown Simpson and Louisiana-Pacific note in their comments that should I deny their variance request they may seek judicial review of my decision and raise the question of whether the variance provision is valid.

proval by the EPA Administrator, and ordered the Executive Officer of the State Board to forward to EPA all necessary information, data and documents for a prompt decision on this matter. Alternative effluent limitations for BOD and pH, to apply in the event the variances were approved or denied by the Administrator, were established in the permits. The dischargers also were granted an extension of time until July 1, 1983, to meet the effluent quality requirements for chromium contained in the California Ocean Plan.[6]

The differences between the permit conditions based on the national effluent limitations guidelines, on the one hand, and those which will result from the granting of the variances from those guidelines, on the other hand, are substantial. In NPDES Permit No. CA0005882 the limitation on BOD5 (daily maximum) is 18,450 pounds, and the limit on total solids is 36,480 pounds. The pH must be maintained within the range of 5.0 - 9.0. According to the terms of the permit, "Upon approval by the Administrator of EPA of the finding of 'fundamental difference' . . . the following limitations shall apply in lieu of the limitations [set forth above]". These are 96,000 pounds per day of BOD5 (daily maximum) and pH within the range of 3.0 to 10.0.

For the Louisiana-Pacific Mill (NPDES permit No. CA0005894) the differences are similar. In all cases the BOD figures cited pertain to the pulp operations, which are by far the major sources of BOD at these facilities.

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6. The National Wildlife Federation filed comments which fully support my denial of the BPT variances but which urge that I also disapprove the extension of time given the two companies by the State for meeting chromium effluent quality requirements derived from the California Ocean Plan. This proceeding, however, is not a general review of the State-issued permits. It concerns only the appropriateness of granting variances from EPA Effluent limitations guidelines, and my decision is limited to this question. I express no opinion whatever on any other aspect of the State proceedings.

II. *The Legal Issue*

The California State Water Resources Control Board found that because there would be "no expected or predictable water quality improvement as the result of imposition of the EPA guidelines [and i]n light of . . . the magnitude of the chemical and energy requirements, and the potential air and land management problems associated with sludge disposal . . . the evidence justifies the variance requested." (Board Opinion p. 17). It is clear that the Board did not find a "fundamental difference" in terms of non-water quality impact itself but instead found non-water quality impact to be significant *because of lack of improvement of local receiving water quality.* In effect, the State granted an exemption from minimum national technology-based standards because of local water quality considerations. This was contrary to the letter and intent of the FWPCA and I have no choice but to disapprove the state action.

The heart of the Louisiana-Pacific and Crown Simpson presentations to the State Boards was the absence of a need to control BOD and pH. In essence, what the companies argue is that because they are located on the Pacific Ocean, with its vast dilution and regenerative powers, one need not be concerned with pollution requirements which assertedly are designed solely to protect the oxygen levels or pH of receiving streams. They argue that the oxygen level even in the immediate area of their discharge pipes is not a matter of concern.

BOD is not a metal or a chemical compound or a specific substance that pollutes the environment. It is a measure of the quantity of oxygen required for the biological and chemical oxidation of water-borne substances under ambient or test conditions. The BOD_5 test is a procedure which provides an estimate of the oxygen consumed by micro-organisms utilizing the degradable matter present in a waste under conditions that are representative of those that are likely to occur in nature. Standard conditions of

time (5 days), temperature, suggested microbial seed, and dilution water for the wastes have been defined and are incorporated in standard analytical procedures. As noted in the Development Document for the Effluent Limitation Guidelines (BPT) for the Bleached Kraft, Groundwood, Sulfite, Soda Deink, and Non-integrated Paper Mills Segment of the Pulp, and Paperboard Point Source Category, at pages 267 and 268:

> The BOD of a waste exerts an adverse effect upon the dissolved oxygen resources of a body of water by reducing the oxygen available to fish, plant life, and other aquatic species. Conditions can be reached where all of the dissolved oxygen in the water is used resulting in anaerobic conditions and the production of undesirable gases such as hydrogen sulfide and methane. The reduction of dissolved oxygen can be detrimental to fish populations, fish growth rate, and organisms used as fish food. A total lack of oxygen due to the exertion of an excessive BOD can result in the death of all aerobic aquatic inhabitants in the affected area.
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> * * *
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> The BOD5 test is also an indicator of the total organic load that is being discharged to a receiving stream. Compounds contributing to this total organic waste load found in pulp and paper mill wastes include terpenes, resin acids, fatty acids, phenols, formic acid, saccharinic acids and other small organic acids. These compounds also contribute to the toxicity of a pulp and paper mill waste.

There are substantial testimony and a number of documentary materials referred to in the record indicating that the waste materials discharged by Crown Simpson and Louisiana-Pacific through their ocean outfalls are not causing a significant environmental problem with respect to oxygen reduction or pH levels in the receiving waters. I do not believe that it is necessary to consider the extent of that problem or debate such issues as the limits

of the mixing zone for the dischargers.[7] For the purposes of reviewing these applications for variances, I will assume that the arguments of Crown Simpson and Louisiana-Pacific are correct in that there is not a need, based purely on water quality considerations, to control the BOD emanating from these mills beyond those levels contained in the variance-based permits. While the facts and arguments are less clear with respect to the pH requirements contained in the national effluent limitations guidelines, I will also assume for the purposes of this proceeding that there is no water quality need to limit the pH discharge other than as contained in the California permits based on the variances.[8]

In its March 17, 1977, opinion the State Board noted that the dischargers had submitted evidence regarding the chemicals required should they be forced to treat their wastes to meet EPA national guidelines, the direct and indirect power requirements associated with such treatment and the potential biological sludge disposal problems which would result from the use of EPA recommended technology (Opinion pages 15-18). Again, for the

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7. I note that the State Board observed that "some of the organic compounds which contribute to the BOD may cause problems in the receiving water . . . ." Opinion p. 7. Crown Simpson and Louisiana-Pacific argue in their comments that it is improper to state that there is any relationship between effluent toxicity and BOD and pH. The quotation, however, accurately reflects the finding of the State Board and I see nothing improper in its inclusion in this opinion.

8. Crown Simpson and Louisiana-Pacific criticize the recommended decision for being too equivocal on the question of the water quality impact of their discharges. However, as noted previously, no independent review of the evidence has been undertaken, and it would therefore not be appropriate for me to endorse or concur in any conclusions reached on this subject by the State. Instead, it is accurate to say only that for the limited purpose of deciding the legal issue presented in this proceeding I assume that limitations on BOD and pH more stringent than those imposed in the variance-based permits would not improve receiving water quality. I find the attack upon the propriety of this procedure curious, since assumption of the existence of facts for limited legal purposes is a judicial technique of long standing.

purposes of this variance proceeding I consider as true the Board findings in these respects.[9]

The issue to be resolved is straightforward: does the Federal Water Pollution Control Act, as amended ("FWPCA") allow EPA to vary technology-based water pollution regulations simply because the receiving water quality at particular sites will not be measurably improved by compliance with those regulations? Counsel for the companies stated the matter this way in a brief before the State Board:

> "[Crown Simpson] and [Louisiana-Pacific] are not asking this Board to countenance a wholesale return to an ineffectual water quality approach. Rather, they submit that they have affirmatively demonstrated that there is a *fundamental* difference between the marine environment into which they discharge and *all other* receiving waters. None of the dilatory or obscurantic tactics sometimes encountered under the old system are possible when the applicant bears the burden of proving its entitlement to a variance. And while most differences in receiving waters are ones of degree, which may be burdensome administratively to distinguish, the difference between the ocean and inland waters is categorical, so that the differentness of the ocean need only be decided once." (p. 24)

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9. The Board did not make independent findings of fact with respect to several of these factors; it merely stated, "the dischargers submitted evidence regarding [these factors.]" In effect, I am accepting as true the assertions of the companies before the State Boards, for the purposes of this proceeding. There was also testimony to the effect that redwood pulp produces more BOD than any other wood species, and that these two mills may be the only mills using that wood (Tr. 47), but there is no explanation in the record as to the contribution this factor would have to the much higher BOD allowed under the variance-based permits. Moreover, I note that this issue was not pressed as an important fact by the companies or relied upon by the State Board, and no mention of this factor was made in comments submitted by the companies on the recommended decision.

Counsel for Crown Simpson reiterated this point during the December hearing (Tr. 101):

> What the companies are saying is that essentially all of the requirements can be met with the exception, perhaps, of the chromium heavy metal requirement through the use of internal procedures. It can be met at a certain cost. To impose the BOD limitation is to impose on them an enormous additional cost with no environmental benefit.

When Congress enacted the Federal Water Pollution Control Act Amendments of 1972, it brought about a major change in the approach to water pollution control. Congress declared in unmistakable statutory language that certain key regulations were to be based on pollution control technology, not water quality. Localized improvement in water quality as the result of compliance with technology-based regulations was desired, but the existence of the nexus was not to be dispositive as to the application of those regulations. The Senate Committee on Public Works explained the reasons for the change in approach:

> The water quality standards program is limited in its success. After five years, many States do not have approved standards. Officials are still working to establish relationships between pollutants and water uses. Time schedules for abatement are slipping away because of failure to enforce, lack of effluent controls, and disputes over Federal-State standards.
>
> The Committee adopted this substantial change because of the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of given stream quality. Water quality standards, in addition to their deficiencies in relying on the assimilative capacity of receiving waters, often cannot be translated into effluent limitations—defendable in court tests, because of the imprecision of models for water quality and the effects of effluents in most waters.
>
> Under this Act the basis of pollution prevention and elimination will be the application of effluent limitations.

> Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement.
>
> The Committee recommends the change to effluent limitations as the best available mechanism to control water pollution. With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality.[11]

S. Rept. No. 92-414, 92nd Cong. 1st Sess. at 8 (1971), Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess. (1973) (2 vols.) (hereafter cited as Leg. Hist.) at 1426.

Both the Act and its legislative history clearly indicate that Section 301(b)(1)(A) effluent limitations are not to be based on the nature, quality or location of receiving waters. This is demonstrated by Section 301(b) itself. Section 301(b)(1) provides that point sources other than publicly owned treatment works must meet, "(A) not later than July 1, 1977 effluent limitations . . . which shall require the application of the best practicable control technology currently available . . . and . . . (C) . . . any *more stringent* limitation, including those necessary to meet water quality standards . . . ." (emphasis added). The basic structure of the Act is therefore clear. Technology-based limitation imposed pursuant to Section 301(b)(1)(A) are independent of local water quality considerations, but where local water quality-based requirements are *more stringent* than 301(b)(1)(A) requirements they may be imposed pursuant to Section 301(b)(1)(C). This statutory structure would be rendered meaningless if 301(b)(1)(A) limitations can be downgraded due to water quality considerations. Section 304(b) of the Act, which lists the factors which must be taken into account in developing Section 301(b)(1)(A) indus-

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11. From 1965 until the enactment of the FWPCA, the quality of interstate waters had been regulated primarily by State water quality standards, which States were required to promulgate and have approved by the Federal Government under the Water Quality Act of 1965.

trial effluent limitations—from which Crown Simpson and Louisiana-Pacific seek relief—conspicuously omits any reference to water quality.[12] Similarly, Section 304(d)(1), which requires the Administrator to publish information on "the degree of effluent reduction attainable through the application of secondary treatment" for the purpose of developing Section 301(b) effluent limitations for municipal treatment works, contains no reference to the nature or quality of the receiving waters. Clearly, Section 301(b)(1)(A) effluent limitations are not to be based on ambient water quality considerations. The Committee hearings and Congressional debates show that there was no misunderstanding of this vital point by the Congressmen voting for this major bill.[13]

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12. Crown Simpson and Louisana-Pacific argue that the statutory phrase "effluent reduction benefits" means water quality impact. As will be shown below, this argument is entirely unfounded. See *infra* at pp. 31-32.

13. *See e.g.:*

From the Senate Report:

> The application of Phrase I technology to industrial point sources is based upon the control technologies for those sources and to publicly owned sewage treatment works is based on secondary treatment. It is not based on ambient water quality considerations. [Leg. Hist. at 1461 (emphasis added.)] The use of any river, lake, stream *or ocean* as a waste treatment system is unacceptable. [Leg. Hist. at 1425 (emphasis added).]

From the House Report:

> The determination of the best practicable control technology currently available under Section 301(b)(1) is not to be governed by the existing quality of the receiving waters. [Leg. Hist. at 788.]

From the Conference Report:

> . . . [T]he intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under [Section 304(b)], so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations. [Leg. Hist. at 309.]

From Congressional Debates:

> Remarks of Senator Muskie, Chairman, Senate Subcommittee on Air and Water Pollution, Leg. Hist. at 170.
>
> Remarks of Representative Jones (Alabama), House Conferee, Leg. Hist. at 231.
>
> Remarks of Senator Tunney, Leg. Hist. at 209.

It perhaps is best summed up in the remarks of Representative Clausen, a House conferee:

> Now, and I emphasize this, such "best practicable control technology" will be required even if the quality of the receiving waters do [sic] not require the imposition of effluent limitations consistent with best practicable control technology. This is a technological standard [Leg. Hist. at 378].

Water quality standards remain a vital part of the amended law, but they are not to be used as a means to avoid compliance with effluent limitations guidelines and new source standards; the discharger must comply with all applicable regulations. The following appears in the Senate Public Works Committee Report:

> Section 301(b)(1)(C) provides adequate authority to apply new information to existing water quality requirements and *upgrade* effluent limits accordingly.
>
> In other words, wherever the Administrator determines that application of the best practicable treatment requirements of Phase I will not provide for implementation of existing water quality standards for interstate or intrastate streams, *he must tighten the requirements* against a source of discharge or group of sources. Leg. Hist. at 1462.

The same is true of water quality related effluent limitations under Section 302:

> Where application of the best available control technology . . . will not attain . . . [the prescribed] standard of water quality, *more stringent effluent limitations* or alternative control strategies can be imposed [under Section 302].
>
> * * *
>
> *Section 302 is intended to furnish a supplemental basis for improving water quality, and not be a cause for delay* in executing the requirements of Section 301, or for requiring

> any less stringent effluent limitations. [Leg. Hist. at 1464, 1466 (emphasis added)].[14]

Congressman Wright, a House conferee, expressed his belief that EPA and the States would approach their regulatory duties as the Senate had outlined. He stated that the combination of technology-based and water-quality based restrictions on discharges was "a new system of cleaning up streams by a limitation upon point discharges, a dual approach [which] provides that whichever is the stronger shall apply." Leg. Hist. at 488.

The Supreme Court recently acknowledged the roles water quality and technology feasibility play under the FWPCA.

> The reasons for the statutory scheme have been described as follows: "Such direct restrictions on discharges facilitate enforcement by makinug it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against

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14. See also Leg. Hist. at 791 (House Report characterizes Section 302 as providing authority to "supplement any effluent limitations set pursuant to [Section 301(b)(2)]" and notes that proposed effluent limitations under Section 302 "shall in no case operate to delay the application of any effluent limitation established under Section 301"); 209 (Senator Tunney observes that effluent limitations are only "a minimum measure of compliance"); 246 (Representative Harsha, a House conferee, notes that "The water quality requirements are not intended to be in lieu of the technological requirements for 1977 but are required to be the basis for water quality control if they are more stringent than the effluent limitations determined by 'best practicable control technology currently available' ", and that "section 303 . . . is intended to be a supplement to the 1977 and 1983 requirements."), 1281, 1283, 1285 (Senator Bentsen, a Senate Committee member, notes that "[w]here a State or the Administrator finds [Section 301 (b)(2) limitations] are insufficient under the criteria of section 302, tougher effluent limitations and alternative control strategies must be established.").

> strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform." *EPA v. State Water Resources Control Board*, 426 U.S. 200, 204-205, 96 S. Ct. 202, 204, 48 L. Ed.2d 578 (footnotes omitted).

E. I. duPont de Nemours and Co. v. Train, 430 U.S. 112, 97 S. Ct. 965, 972, n. 3 [9 ERC 1753] (1977).[15]

When Congress intended there to be deviation from technology standards due to water quality considerations, it provided definite indication of that intent. Thus, Section 316(a) provides for relaxation of technology-based limitations for thermal discharges, when the discharger can demonstrate that the environment will be protected adequately.[16]

It is in light of this strong Congressional sentiment against water-quality based exceptions from national technology standards that the Crown Simpson and Louisiana-Pacific appeals must be considered, and against which the decisions of the California

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15. Similarly, the U.S. District Court for the Central District of California recently observed that "Section 301 deals with the technological control of pollutants at their source, *without regard to their effect on the immediate environment . . . .*" *Pacific Legal Foundation v. Quarles*, Civil No. 77-521-HP [10 ERC 1369] (July 20, 1977), slip op. at 8 (emphasis added).

16. That section states:

> With respect to any point source otherwise subject to the provisions of section 301 or section 306 of this Act, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection [sic] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component of such discharge with other pollutants) that will assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in and on that body of water.

Water Resources Control Board must be viewed. To the extent that the Board Opinion assumes regulatory authority to relax implementation of technology-based standards for reasons related to water quality, that Opinion is wrong. Efforts by commenters (particularly Hunton & Williams) to argue otherwise are unpersuasive. There is nothing inconsistent between the ultimate congressional goal of cleaner water and the technology-based approach required by Section 301(b)(1)(A) of the Act. As explained by Senator Cooper, a Senate Conferee,

> This is a very direct approach. It is a pragmatic approach. I think we all acknowledge that, in the short run, it may often require larger expenditures then permitting discharges to the point where the water can be shown to be degraded for some use. But I think it is fair to say that after the most thorough examination, the committee concluded that the approach adopted in the bill promised to be a far more effective means of attacking the problems of water pollution control than the 1965 act. Leg. Hist. at 1304. While Hunton & Williams quote Representative Jones' statement that Congress did not wish "to credit one environmental account and debit another" so as to "negate the overall benefit of the achievement of higher water quality", Leg. Hist. at 232, they ignore the same congressman's statement that "With the exception of modifications of section 301 requirements for the discharges of heat which may be made pursuant to section 316(a), the determination of the *'best practicable control technology currently available' is not to be based upon the existing quality of the receiving waters.*" Leg. Hist. at 231. (emphasis added). Congress consciously adopted the Section 301 approach of uniform minimum levels of controls based on technological achievability rather than receiving water quality as its chosen means to attain the

goals set out in Section 101 of the Act.[17] I have no authority to defy that statutory mandate.[19]

Crown Simpson and Louisiana-Pacific argue that this proceeding presents a situation in which the practical problems normally associated with a water quality related approach to pollution control do not apply, and that therefore an exception to the technology-based approach of Section 301(b)(1)(A) is warranted. They contend that Congress adopted the technology-based approach largely out of concern with the difficulty of calculating and defending water-quality based requirements, but that this concern does not apply here because the burden of proof in a

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17. Moreover, I think that it should be remembered that the *first* enumerated goal set out in Section 101(a) is "that the discharge of pollutants into navigable waters be eliminated by 1985." As thoughtfully explained by Senator Buckley this goal indicates a congressional belief that ultimately *no level* of discharge of pollutants should be tolerable.

> Of course, the bill itself has abandoned the attempt, as an ultimate goal, of drawing a causal connection between the discharge of pollutants and the degradation of our streams. In effect, we are saying we know so little about the ultimate consequences of injecting new matter into water that it involves a presumption of pollution, and the way to insure ourselves against pollution is through the control and ultimate elimination of pollutants.
> Leg. Hist. 1332.

19. [sic] Hunton & Williams also argue that my decision in *In Re Public Service Company of New Hampshire* [10 ERC 1257] (No. 76-7, June 17, 1977) ("Seabrook") is inconsistent with the legal analysis in this decision. In *Seabrook* at page 13 I found that Section 316(b), which concerns cooling water intake structures, does not require use of technology whose cost is wholly disproportionate to the environmental benefit to be gained. I see no inconsistency. Sections 301(b)(1)(A) and 316(b) are quite different. Section 316(b) is explicitly site-specific while Section 301(b)(1)(A), as discussed above, concerns uniform national standards. Moreover, Section 316(b) concerns the environmental impact of entrapment and entrainment while Section 301(b)(1)(A) concerns reduction in the amount of pollutants discharged by industrial point sources. In establishing effluent limitations guidelines for the paper industry the Agency considered cost in relation to effluent reduction benefits. But the fact that this analysis did not involve consideration of local receiving water quality is inconsistent with neither my decision in *Seabrook* or the language and history of Section 301(b)(1)(A).

variance proceeding is on the discharger rather than EPA and because the discharger must show a "fundamental" difference in water quality impact. Similarly, the fact that this is a variance proceeding is said to mean that the congressional desire for uniformity of requirements will not be compromised and that the administrative burden upon EPA will not be exessive.

I do not share the companies' confidence that merely by casting matters in the form of a variance that all problems associated with a water-quality based approach evaporate. At best, problems of correlating effluent discharge levels to water quality and of maintaining a measure of national uniformity may be reduced. But these problems will certainly remain severe. More important, regardless of whether or not a water-quality based variance would be meritorious, it would not be consistent with the statute. Congress was well aware of the possibility of such a variance and adopted just such a provision for thermal discharges in Section 316(a). The limitation of Section 316(a) to heat was, in effect, a deliberate rejection by Congress of the kind of scheme proposed by the two companies here.[20]

The question presented is one of fundamental importance under the Act. Congress deliberately chose a technology-based approach and fully appreciated the fact that under certain circumstances it would result in treatment beyond that needed to attain or maintain water quality. To retreat from this basic congressional scheme in this proceeding would, despite Crown Simpson's and Louisiana-Pacific's bland assurances to the contrary, set a precedent which would threaten the integrity of the Act.[21]

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20. Congress is now considering amendments to the Act which would provide relief to publicly owned treatment works discharging to marine waters. *See* H.R. 3199, S. 1952. These amendments would not apply to industrial dischargers.

21. While the companies assured the State that their arguments applied only to marine discharges, *see supra* at p. 14, the fact is that their arguments logically apply to discharges into any body of water with high dispersion characteristics, and therefore these arguments represent an assault upon one of the basic elements of the 1972 amendments.

The March 17, 1977, Order and Opinion of the California Water Resources Control Board does not directly dispute the interpretation of the FWPCA which I have presented. Instead, the Board appears to rely heavily on recent judicial discussion of EPA's variance clause to support its approval of variances for Crown Simpson and Louisiana-Pacific. However, I cannot agree with the Board's determination. One reason is that I do not believe the cases support the legal position adopted by the Board. Second, I believe the Board's action in effect is the granting of water quality-based variances, which is prohibited.

Essential to a careful review of the Board's determination are the following findings by the Board:

1. "There do not appear to be any environmental benefits which will be derived by requiring these discharges to meet either the [California State] Ocean Plan or Guideline limitations for BOD or pH." (Board Opinion p. 9)

2. "In appraising the evidence related to non-water quality environmental effects and energy requirements the Board must at least in part appraise the significance in terms of the potential environmental benefits to be gained as a result of the imposition of the EPA Guidelines. In this case we have unrefuted evidence presented by the dischargers and concurred with by the Regional Board Executive Officer that the existing discharges result in no water quality problems. Secondly, there is no expected or predictable water quality improvement to be achieved as the result of imposition of the EPA Guidelines. In light of these facts (the magnitude of the chemical and energy requirements, and the potential air and land management problems associated with sludge disposal) we can only conclude the evidence justifies the variance requested." (Board Opinion pp. 16-17).

The variances were granted not because the non-water quality environmental impacts of BPT were of themselves fundamentally different from the impacts considered in the development of the

effluent limitations guidelines, but instead because this factor *in relation to* the absence of water quality problems was deemed to be fundamentally different. I cannot find any statement by the State Board that the non-water quality environmental impacts (i.e. sludge, energy etc.) of BPT for the two mills are fundamentally different in and of themselves.[22]

The only aspect of the Crown Simpson and Louisiana-Pacific situation which was found different from most other mills is, in effect, that they discharge directly into the ocean. The companies candidly admitted that this is the "fundamental" difference in the State proceedings.[23]

The issue resolves into asking whether water quality considerations are valid grounds for variances from effluent limitations based upon best practicable technology. The answer to this, as the California Board itself stated, is that it is not a valid basis:

> The argument advanced by the dischargers (variance based on type of the receiving water) is, in our opinion, the essence of what Congress intended to avoid with the Federal Water Pollution Control Act Amendments of 1972. The legislative history of the Amendments reflects a conclusion that regulation of pollution based on a plant by plant basis was unwork-

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22. The problems associated with sludge disposal on the Samoa peninsula was mentioned by the Board as if this were possibly a fundamentally different factor. But the record is ambiguous on the point. The companies did not rely on this difference in their requests for variances to the State. And the State never explicitly found sludge disposal problems at the two mills to be fundamentally different from those problems considered by EPA in developing the regulations.

23. See *supra* at p. 14. Witnesses for the companies, and counsel in their behalf, have stated that these mills were never considered by EPA in drafting national regulations. The State Board opinion also states this (p. 5). According to a key to the identification of plants used in the preparation of the Development Document, which key has been made available to all who have requested access—including Crown Simpson and Louisiana-Pacific, both mills were evaluated by EPA. For example, on page 186 of the Development Document, plant 185 (Crown Simpson) and plant 186 (Louisiana-Pacific) are listed. Data for production, flow, BOD5, and TSS for the Crown Simpson mill were used in calculating national limitations. There were insufficient data for Louisiana-Pacific's mill to be used this way.

> able from a practical regulatory standpoint. Congress based the Amendments on predefined minimum levels of treatment technology which were to be applied regardless of the type of receiving water. (Opinion, p. 6).

My authority to provide for variances from BPT flows from, and is inherent in, my authority to promulgate effluent limitations guidelines under Sections 301(b)(1)(A) and 304(b)(1).[24] Thus, in considering variances from effluent limitations I am as constrained by the language and legislative history of the Act with regard to this issue as I am in promulgating the national limitations. Variances can only be based on fundamental differences in factors which are appropriate to technology-based regulations and limitations derived through the variance process must still meet the congressional difinition of best practicable control technology currently available.

I therefore reject as unsound the argument by Crown Simpson and Louisiana-Pacific that because variances from BPT are not explicitly mentioned in the Act or its legislative history that I may completely ignore the statute and the intentions of its drafters in administering the variance provision. But in so doing I do not agree that I have rendered the variance provision meaningless. I find only that the variance provision cannot be used to do what Congress clearly forbade. This does not mean that where a fundamental difference can be shown with respect to a factor other than water quality that a variance may not be appropriate.[25]

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24. For this reason it is entirely appropriate that variances from BPT be subject to my approval.

25. The two companies charge that by rejecting their requests I have established that "it is never appropriate to grant a variance from the requirement of installing a secondary treatment facility." If a fundamental difference can be shown in a factor (other than water quality) and a degree of treatment less than "secondary" would be appropriate under the Act, then such a reduced requirement may be established. But whatever requirement is established for a discharger, whether or not by variance and whether or not it represents "secondary" treatment, it must, for the July 1, 1977 phase of the statutory program, represent "best practicable control technology currently available".

The State Board also recognized that water quality considerations cannot be utilized to grant a variance through a weighing of costs and benefits with regard to an individual mill. The Board properly rejected the companies' contention that while their costs of compliance are not substantially different[26] from the costs EPA found would be sustained on an industry-wide basis, their costs *weighed against the local water quality benefits* justify a variance. The legislative History of the Act firmly rejects any individualized cost/benefit analysis, and no court has ever required it.[27]

Crown Simpson and Louisiana-Pacific also contend that the phrase "effluent reduction benefits" in Section 304(b)(1)(B) means "receiving water quality improvement" and, further, that EPA conceded as much in its brief filed in *Weyerhaeuser Co. v. Costle* (No. 76-1674) now pending in the U.S. Court of Appeals for the D.C. Circuit. But, as explained by Senator Muskie:

> The modification of subsection 304(b)(1) is intended to clarify what is meant by the term "practicable". The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of pro-

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26. Opinion p. 14.

27. *See* Leg. Hist. at 170 (statement of Senator Muskie). *See also* Leg. Hist. at 304, 309 (Conf. Rept.). The Fourth Circuit in *Appalachian Power Co. v. Train*, 545 F.2d 1351 [9 ERC 1033] (4th Cir. 1976), although it found the variance clause too narrow, noted that:

> In requiring that EPA give weight to the relevant statutory factors in developing a subsequent variance provision, we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage. As we indicated in [duPont v. Train, 541 F.2d 1018 (4th Cir., 1976)], an overall cost-benefit analysis for each category or subcategory satisfies the mandate of § 304 in this regard. The variance provision should, however, allow the permit issuer to consider significant cost differentials of the particular point source involved. 545 F.2d at 1360, n. 23.

In arguing that *Appalachian Power* stands for the proposition that water quality benefits must be considered in variance decisions Crown Simpson and Louisiana-Pacific ignore this (and other) pertinent language of that case.

portion to the costs of achieving such marginal level of reduction for any class or category of sources.

The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, *and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls,* or to determine the economic impact of controls on any individual plant in a single community.

Leg. Hist. at 170 (emphasis added). See also Leg. Hist. at 304, 309 (Conf. Rept.).

Thus, it is clear that consideration of effluent reduction benefits does not entail consideration of local receiving water quality improvement. Nothing in EPA's brief in *Weyerhaeuser* is to the contrary.[28] Moreover, the Development Document, at page 566,

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28. On pages 50-51 of that brief any notion to the contrary was explicitly repudiated:

> Petitioner's suggestion that the method by which the pollutant parameters for the pulp and paper industry were selected is inconsistent with EPA's argument that it may not base effluent limitations on receiving water quality is also without merit. As discussed at length in Section VI of the Final Development Document, EPA based its selection of pollutant parameters on its consideration of a number of factors. Petitioners correctly note that one of those factors was the environmental harm caused by the particular pollutant. But it must be emphasized that the Agency's evaluation of that factor was limited to a consideration of harmfulness in a generic sense. That analysis is far different from the site-specific water quality assessment which petitioners would require of the Agency. EPA has never required, nor has any Court, that the pollutants it regulates have an equally harmful effect in all water bodies. That BOD and pH are generally harmful is not disputed by petitioners and is documented in the record.
>
> Moreover, harmfulness was only one element in EPA's selection of BOD and pH for the paper industry. At least as important a factor was the historic measurement of those two parameters by the industry itself—including mills with marine discharges. BOD was selected for the additional reasons that the BOD_5 test provides an indirect measure of other pollutants in mill waste streams and that systems for the removal of BOD also remove these other,

shows that EPA analyzed "Costs of BPCTCA vs. Effluent Reduction Benefits" not in terms of receiving water quality improvement but in terms of the amount of pollution removed from discharges.

Where the State Board erred was in finding grounds for variances on the basis of non-water quality environmental impacts. As I have already observed, the Board did not find these impacts, of themselves, to be fundamentally different from the impacts considered on a national basis. Instead, the Board found these impacts to be the basis for variances when weighed against, or considered in light of, the lack of environmental improvement. Crown Simpson and Louisiana-Pacific argue in their comments that the State did not rely upon local water quality considerations in its decision and that it did in fact find a fundamental difference in terms of non-water quality impact alone. But the companies cite only to State observations that there would be non-water quality environmental impacts as a result of compliance with EPA effluent limitations guidelines, not to any finding of *fundamental difference* on this point.[29]

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indirectly measured pollutants, including long term BOD, oil and grease, foam, and a number of compounds which contribute to toxicity. There is nothing inconsistent between this analysis and the general legislative history forbidding the establishment of effluent limitations based on the assimilative capacities of receiving waters. (footnotes and citations omitted.)

29. Extensive analyses of the non-water quality environmental impacts of the effluent limitations guidelines for the pulp and paper industry, including sludge landfilling and incineration, air pollution, noise effects, and energy impacts, were performed by EPA and are reflected in the Development Document. See, e.g., pages 349-354, 433-440, 480-483, 490-494, 504-506, 512, 524-538.

Perhaps one reason why no finding of fundamental difference in non-water quality environmental impact alone was found by the State was the testimony of Dr. Herman R. Amberg, Director of Environmental Sciences for Crown Zellerbach Corporation (part owner of the Crown Simpson Company), a witness on behalf of Louisiana-Pacific and Crown Simpson. In response to questions posed by Mr. Sam Johnson, a staff engineer for the State, at the December 22, 1976, hearing he said: (Tr. 79, 80, 82):

I find the State's conclusion as to the propriety of granting the variances to be based on non-water quality environmental impacts only in light of water quality considerations, and not independently.[30]

Mr. JOHNSON: Q. With regard to the issue of variance fundamental differences, is there any difference in your plant and the plants that were examined by EPA with regard to age of the facilities that would support a variance?

A. No, sir.

Q. The process employed?

A. It's essentially the same process.

Q. The engineering aspects of the control technology?

A. I don't think so. I'm not that familiar with the 25 mills that they used.

Q. The process changes required by the guidelines?

A. I'm not sure.

Q. Is the installation of the technology specified by EPA in the development document as BPCTCA within the economic capacity of your company?

A. Yes.

Q. How does your plant compare in the area of non-water quality environmental impacts with the plants that EPA utilized in developing the guidelines?

A. I don't think there's that much difference. However, I should point out, too, that those plants that EPA considered, there was a need for secondary treatment in that they did improve water quality. There was a bona fide need for improvement of the water quality while here there will be no benefit as far as water quality is concerned.

Dr. Amberg's comments apply equally to the two mills. His counsel asked him: "And just to clarify for the entire part of your testimony, are the Louisiana-Pacific and Crown Simpson Mills sufficiently similar so that what you have testified to with respect to Crown Simpson would equally apply to Louisiana-Pacific?" His response was "Yes." (Tr. 67, 68.)

30. However, I do find well taken the companies' admonition that I should not make a finding that the State *could not* had it properly interpreted the Act, have found fundamental difference with regard to non-water quality environmental impact. I have not independently reviewed the factual record. I therefore express no opinion as to whether the two mills could be found fundamentally different in terms solely of non-water quality environmental impact. This is a matter properly addressed in the first instance by the State. Further, this decision does not stand for the proposition that fundamental difference in this factor cannot justify a variance. Concerns along this line expressed by Southern California Edison Company and others are based on a misunderstanding of the

First of all, the Act does not require that non-water quality environmental impact (or energy requirements) be weighed against environmental benefit. This factor is only to be given "consideration". Section 304(b)(1)(B).[31] Moreover, it should be obvious that where this factor is deemed fundamentally different, not in its own right but only because water quality effects are different, then the distinction between a variance granted on this basis and one granted directly for water quality reasons is only a form of words. A water quality based variance cannot be granted merely because it is in the guise of a non-water quality environmental impact based variance. *Appalachian Power Co. v. Train, supra,* does not support the State's Opinion on this point. Nothing in that court's opinion authorizes any balancing of non-water quality benefits with water quality benefits, or any localized consideration of water quality improvement. In fact, the court rejected a request by Consolidated Edison Company that it be relieved from meeting the effluent limitations for its plant because of the high cost of non-water quality environmental impacts of the regulations as applied to it as weighed against an asserted lack of water quality improvement in New York Harbor. The court responded:

> "so far as [Con Ed's] petition may be read as a request for leniency because of the already polluted condition of the harbor, it must be rejected. The 1972 amendments to the

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legal analysis which is the basis for my denial of the variance requests at issue here. There is no reason why, in a proper case, a fundamental difference in non-water quality environmental impact could not justify a variance.

31. Crown Simpson and Louisiana-Pacific argue that non-water quality environmental impact can only be considered by means of a balancing with water quality improvement and that my interpretation of Section 304(b)(1)(B) is strained. On the contrary, I read Section 304(b)(1)(B) quite faithfully. Where Congress intended one factor to be considered in relation to another, such as cost and effluent reduction benefits, it so specified. Where it did not do so I take the omission to be deliberate.

> statute changed the system from that of control of the quality of the body of water to effluent limitations as we have before noted. 545 F.2d at 1378.

Moreover, as noted previously, the Fourth Circuit specifically noted that "we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage." See note 27 *supra.* I do not understand how the opinion in the *Appalachian Power* case can be held to stand for a principle specifically disavowed by the Court.[32] In fact, the Second Circuit squarely faced this issue and held that:

> The EPA . . . need not document specifically the benefits to society from the curtailment of pollutants from a particular point source. Congress has established as a national goal the complete elimination of pollutant discharges by 1985 . . . . The EPA must lead industry toward that goal through the 1977 and 1983 standards, and the agency's discretion is necessarily broad. *California & Hawaiian Sugar Company v. Environmental Protection Agency,* 553 F.2d 280, 289 [9 ERC 2129] (C.A. 2, April 14, 1977).[33]

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32. In any event, the continuing vitality of the criticism of the variance clause in *Appalachian Power* is now in doubt in light of the recent decision of the Supreme Court in *E. I. duPont de Nemours and Co. v. Train,* 430 U.S. 112, 97 S. Ct. 965 (1977). In that case the Supreme Court reviewed an earlier decision of the Fourth Circuit concerning EPA effluent limitations and noted that "consideration of whether EPA's variance provision has the proper scope would be premature." 97 S. Ct. at 975, n. 19. *See also; Natural Resources Defense Council v. EPA,* 537 F.2d 642, 647 [8 ERC 1988] (2d Cir. 1976); *American Petroleum Institute v. EPA,* 540 F.2d 1023 [10 ERC 1252] (10th Cir. 1976).

33. *See also FMC Corp. v. Train,* 539 F2d 973, 983 [8 ERC 1731] (4th Cir. 1976) in which the court rejected the argument that EPA can only regulate pollutants which it finds to be harmful to receiving waters.

Conclusion

Providing relief from technology-based effluent limitations guidelines due solely to the characteristics of particular receiving waters is not within my authority. I am convinced that the law does not permit exemption of Crown Simpson and Louisiana-Pacific from effluent limitations guidelines on the record before me, in which I discern the type of receiving water as being the "fundamental difference" between Crown Simpson's and Louisiana-Pacific's Samoa Peninsula mills on the one hand, and other pulp and paper mills, on the other.

Accordingly, I deny the variance requests and disapprove the effluent restrictions contained in NPDES Permit No. CA0005882, paragraph B4, and NPDES Permit No. CA0005894, paragraph B5.

Appendix D

State of California

State Water Resources Control Board

In the Matter of the Review of Crown Simpson Pulp Co. and Louisiana-Pacific Corporation Orders Nos 76-133 (NPDES No. CA0005282) and 76-134 (NPDES No. CA 0005894) of the California Regional Water Quality Control Board, North Coast Region.	Order No. WQ 77-6

BY BOARD VICE CHAIRMAN MAUGHAN:

On August 26, 1976 the California Regional Water Quality Control Board, North Coast Region (Regional Board) adopted waste discharge requirements (Orders Nos. 76-133, NPDES No. CA0005282 and 76-134, NPDES No CA0005894) for Crown Simpson Pulp Co. (Crown Simpson) and Louisiana-Pacific Corporation (Louisiana-Pacific) (hereinafter sometimes collectively referred to as "dischargers"), respectively. On September 3, 1976, the United States Environmental Protection Agency (EPA) issued a letter of objection to the Regional Board orders prescribing waste discharge requirements for the discharges. On October 7, and October 27, 1976, Crown Simpson and Louisiana-Pacific, respectively, filed petitions in the Ninth Circuit Court of Appeal requesting the Court to overturn the action of the Administrator of EPA, Region IX, in objecting to the granting of a variance by the Regional Board. On October 21, 1976, the State Water Resources Control Board (State Board) adopted Resolution No. 76-108 to review the action of the Regional Board On December 22, 1976, the State Board held a hearing regarding the establishment of appropriate waste discharge requirements for the dischargers.

I. BACKGROUND

The dischargers each operate bleached kraft pulp mills located on the Samoa Peninsula, on the west side of Humboldt Bay. Louisiana-Pacific also operates a saw and plywood mill at this location. Louisiana-Pacific was formed in September 1972 from a portion of Georgia-Pacific Corporation.

Each pulp mill produces about 600 air dry tons per day of bleached kraft pulp. The Louisiana-Pacific saw mill produces about 500,000 board feet per day of lumber. Each mill primarily discharges through a separate ocean outfall about 2,500 feet long with the diffuser located at a depth of 30-40 feet. The outfalls are about one mile apart.

The dischargers are presently discharging under waste discharge requirements issued by the Regional Board on September 4, 1968. Monitoring and reporting is being done under the requirements of Monitoring and Reporting Programs Nos. 74-211 (Crown Simpson) and 74-212 (Louisiana-Pacific) which were issued December 31, 1974, effective February 1, 1976.

On December 4, 1974, the Regional Board adopted waste discharge requirements for the dischargers. At that time formally promulgated EPA effluent limitations guidelines were not available. EPA objected to the Regional Board orders on the basis that the Regional Board failed to implement fully the provisions of Section 301 of the Federal Water Pollution Control Act[1] by not imposing effluent limitations which would require achievement of "best practicable control technology currently available" (BPCTCA) by July 1, 1977.

Subsequently, the State Board reviewed the Regional Board orders both on its own motion and in response to petitions filed by each of the dischargers. The State Board, after receiving evidence at a hearing on March 7, 1975, remanded the orders to the

1. 33 U.S.C. 1251 *et seq.*

Regional Board with the direction that effluent limitations based on BPCTCA be included. If formally promulgated guidelines were available, they were to be applied. Otherwise, the Regional Board, after considering all relevant evidence, was to establish limitations based on its best judgment of what constituted BPCTCA.

On February 19, 1976, EPA promulgated Effluent Limitations Guidelines and Standards, Pulp, Paper, and Paperboard Point Source Category (Guidelines)[2]. The Guidelines contain a variance provision for each subcategory of this Point Source Category. The variance provision is set forth, in pertinent part, at page 5 of this Order. On July 6, 1976, various corrections to the Guidelines (mostly of typographical errors) were promulgated. On January 6, 1977, EPA further modified the Guidelines. The effect of this latest modification on these dischargers is limited to a slight relaxation of the limitations on BOD5 and total suspended solids.

After hearing extensive testimony at its June 24, 1976, July 29, 1976, and August 26, 1976, meetings, the Regional Board adopted Order No 76-133 (NPDES CA0005282) for Crown Simpson and Order No. 76-134 (NPDES CA0005894) for Louisiana-Pacific on August 26, 1976.

On September 3, 1976, EPA issued a letter of objection to the Regional Board orders. Grounds cited by EPA were inclusion of effluent limitations less stringent than the Guidelines without prior approval by the Administrator. It appears that EPA's objection on procedural issues could have been precluded had the Regional Board orders included Guideline limitations and provisions that the alternate limits for BOD and pH would become effective only upon approval by the Administrator.

II. ISSUES AND FINDINGS

The dischargers requested (and the Regional Board granted) a variance from the EPA Guidelines for BOD and pH based

2. Title 40, Code of Federal Regulations, Part 430.

both on a claim of "fundamental difference" in accordance with the variance provisions of the Guidelines and on precedent established in the decisions of several U.S. Courts of Appeals; particularly the Fourth Circuit's decision in the case of *Appalachian Power Company v. Train*[3] (hereinafter, *Appalachian*). The dischargers have also requested several variances from Ocean Plan requirements.[4] Finally, they have raised a procedural objection to the State Board's resolution of the question as to whether a variance from EPA Guideline limitations is appropriate at this time. The dischargers contend that the State Board should not take action on this question pending resolution in the Federal courts of certain lawsuits involving the validity of EPA's Guidelines and variance provisions. Each of the dischargers' contentions will be discussed separately below.

1. Contention that the Dischargers' Facilities are Fundamentally Different in that they Discharge to Ocean Waters.

The dischargers argue that the fact that they discharge to the ocean with its vast diluting and buffering capacity is sufficient for a finding of "fundamental difference" under the variance provision of EPA's Guidelines. They base this on the following portion of the currently applicable variance provision:

> "An individual discharger . . . may submit evidence . . . that . . . factors relating to the equipment or facilities involved, the processes applied, or *other such factors* related to such discharger are fundamentally different from the factors considered in the establishement of the guidelines." (Emphasis Added)

Since none of the bleached kraft pulp mills considered by EPA in the process of Guideline development discharge to the ocean,

3. 545 F. 2d 1351.

4. Water Quality Control Plan for Ocean Waters of California adopted by the State Board on July 6, 1972.

the dischargers contend that this fact alone is sufficient to establish fundamental difference.

The State Board disagrees with the contention of petitioners that a variance from the Guidelines based upon a finding of fundamental difference should be granted because of the type of receiving water. This position is supported by the following quotations from the Legislative History of the Federal Water Pollution Control Act:

> "The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction benefits is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources.
>
> "The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community."[5]
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> * * *
>
> ". . . the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines . . . so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into

5. Exhibit 1 to the remarks of Senator Muskie, Senate Consideration of the Report of the Conference Committee, as set forth in *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Congressional Research Service, Library of Congress, Vol. 1, January 1973, at 170.

which the discharge is made, will meet similar effluent limitations."[6]

The argument advanced by the dischargers (variance based on type of the receiving water) is, in our opinion, the essence of what Congress intended to avoid with the Federal Water Pollution Control Act Amendments of 1972. The legislative history of the Amendment reflects a conclusion that regulation of pollution based on a comparison of cost with receiving water benefits on a plant by plant basis was unworkable from a practical regulatory standpoint. Congress based the Amendments on pre-defined minimum levels of treatment technology which were to be applied regardless of the type of receiving water.

2. *Contention that Biochemical Oxygen Demand (BOD) and pH do not Constitute Pollutants in this Specific Case and that the Present Dischargers have no Adverse Environmental Effects.*

The dischargers presented extensive evidence both before the Regional Board and before the State Board that there are no adverse environmental effects associated with their present discharges. Dr. Joseph, Regional Board Executive Officer, agreed that he knew of no evidence that indicates that, in the case of these two discharges, BOD is a problem.

The State Board publication *Water Quality Criteria*[7] states:

"In itself, BOD is not a pollutant and exercises no direct harm. Only by depressing the dissolved-oxygen content to levels that are inimical to fish life and other beneficial uses does BOD exert an indirect effect. Where reaeration, dilu-

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6. Conference Report, House-Senate Conference Committee, discussion of Section 304 of the conference substitute, as set forth in *A Legislative History of the Water Pollution Control Act Amendments of 1972*, op. cit., note 5, at page 309.

7. McKee and Wolf, *Water Quality Criteria*, Second Edition, State Water Resources Control Board, Pub. No. 3A, Reprint June 1, 1976, at page 147.

> tion, and/or photosynthetic action offset or minimize this depletion, BOD does not interfere with the reasonable uses of the water."

Thus, while some of the organic compounds which contribute to the BOD may cause problems in the receiving water, the State Board does not dispute the dischargers' contention that BOD, in and of itself, is not a pollutant when properly discharged into a marine environment. Further, the record contains no evidence to contradict this conclusion, and there is evidence that the dissolved oxygen content of the seawater is not depressed to any noticeable degree outside the initial dilution zone.

The dischargers have also submitted substantial evidence that the discharge of waste outside the 5-9 pH range permitted by the EPA Guidelines has no effect on a marine environment.

The EPA Development Document[8] cites no adverse effects of pH that would be of concern in the marine environment.

Concerning pH, *Water Quality Criteria*[9] also states:

> "Conversely, the concentration of weakly dissociated acids and bases markedly affects the pH value and the ease with which it can be altered. For this reason, pH should not be confused with acidity and alkalinity. The presence of carbonates, phosphates, borates, and similar ions give water a buffering power so that the addition of an acid or base is less likely to be deleterious."

It cannot be said that the discharge from these two plants is exceptionally low in either acidity or alkalinity, but the buffering capacity of seawater is so strong that there is no reason to doubt

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8. Development Document for Advanced Notice of Proposed or Promulgated Rule Making for Effluent Limitations Guidelines and New Source Performance Standards for the Bleached Kraft, Groundwood, Sulfite, Soda, Deink, and Non-integrated Paper Mills Segment of the Pulp, Paper, and Paperboard Mills, August 1975.

9. Op. Cit., footnote 7, at page 235.

the testimony of the dischargers' experts that the receiving water pH is not changed more than 0.2 units outside the initial dilution zone. Thus, with pH, also, there is no evidence in the record to dispute the dischargers' allegation that the high or low pH of their discharges causes no problem when diffused into seawater.

In summary, it has been clearly shown, in this particular case, that neither the discharge of BOD nor pH results in a discernible impact or a threat of damage to the marine environment. EPA in its Development Document cites the reasons why it has selected BOD and pH as pollutants to be controlled in the discharge from pulp mills. The discussion of BOD effects in the Development Document indicates that BOD must be controlled because it depresses dissolved oxygen levels resulting in damage to fish populations (such as delayed hatching of eggs and decreased tolerance to certain toxicants) and damage to fish food organisms. The Development Document points out that death may result if dissolved oxygen is reduced severely by high levels of BOD.[10] The discussion of pH effects in the Development Document indicates that low pH water supplies may corrode household plumbing and, thus, add heavy metals to drinking water supplies. Extremes of pH or rapid changes in pH may stress or kill acquatic life and toxicity of many materials is increased by changes in pH.[11] As the above discussion indicates, the reasons cited by EPA for the Guideline BOD and pH requirements are not valid in this case. The dischargers have submitted adequate evidence to refute the presumptions made by EPA regarding the polluting nature of BOD and pH.

Therefore, based on the record before us, we must conclude that there do not appear to be any environmental benefits which will be derived by requiring these dischargers to meet either the Ocean Plan or Guideline limitations for BOD or pH.

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10. Development Document, op. cit., note 8, at 188.

11. Id. at 192.

3. *Contention that Judicial Precedent Dictates that a Broad Range of Factors including Non-water Quality Environmental Effects and Energy Requirements be Considered in Deciding whether Guideline Numbers should be applied to a Particular Discharger*

The dischargers assert that the Regional Board and State Board should be guided in resolving the question of "fundamental difference" by the logic contained in the decision in the *Appalachian* case.

The variance provision under consideration in *Appalichian* was identical to the provision which has been promulgated by EPA for the sources under consideration here. The operative language from the variance provision is set forth at page 5 above. The court found in *Appalachian* that the provision did not allow for adequate flexibility in application of nationwide guidelines to particular point sources and remanded the variance provision to EPA for modifications which would allow for reconsideration at the permit issuance stage of all factors required by P.L. 92-500 to be considered at the time guidelines are originally developed. Specifically, the court stated:

> "As we noted in *duPont*, 541 F.2d 1018, Nos. 74-1261, et al, provisions for variances are appropriate to the regulatory process. This is particularly so in the case of regulations having presumptive applicability throughout the nation. The factors to be taken into consideration, however, ought ordinarily to be at least as broad as the factors relied upon in establishing the limitation if the provision is to have meaning. In the instant case, EPA has said that a variance from the 1977 standards will be granted only where 'the factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from those factors considered in establishing the guidelines'. Thus, only technical and engineering factors, exclusive of cost, may be considered in granting or denying a variance. Based upon the

Act taken as a whole, we are of the opinion that such a variance clause is unduly restrictive and, accordingly, 40 CFR 423.12(a), must be set aside and remanded for further consideration."

* * * *

". . . [*w*]*e note that both* § *304 (1977) and* § *306 (new sources) provide that the factors to be taken into consideration in determining the 1977 and new source standards include not only the engineering aspects of the various types of control technology, but also (1) the total cost of application of such technology (cost of achieving such effluent reduction) and (2) the resulting non-water quality environmental impact (including energy requirements). The EPA has offered no reasoned explanation for limiting the variance clause to considerations of technical and engineering factors only. Certainly the adverse non-water quality environmental impact which may result from the strict application of the agency's effluent limitations to a particular plant is as significant as the technological difficulties which may be encountered. The same may be said for a consideration of energy requirements.*"[12] (Emphasis Supplied.)

The court in *Appalachian* described, as follows, how the uniformity in effluent requirements which Congress anticipated from permit to permit within a point source category could be maintained while, nevertheless, providing for a reasonable amount of flexibility in the permit program:

". . . 'we believe that the solution which most nearly satisfies congressional intent is recognition that the regulations are presumptively applicable to permit applications' (citation omitted). *Thus, the issuer of a permit under* § *402 may consider whether a particular applicant is to be held strictly to the confines of the agency's regulations. The burden of proof remains upon the applicant, however. Only after he has established the inappropriateness of the regulations as*

12. Op. cit., note 3 at 1358-1359.

> *applied to him, for example, employing the generic factors of §§ 304, 306 or any specific variance clauses promulgated thereunder, need the permit issuer go beyond the regulations. Of course, the permit issuer does not have unreviewable discretion in determining whether limitations prescribed under a particular regulation should be deemed inapplicable to any individual point source.* Under § 402(d)(2), EPA may prevent the issuance of any permit to which it objects. Thus, through the exercise of this veto power, the agency may insure that the permit grantors give proper recognition to the need for uniformity in the application of the Act while at the same time recognizing variables which may exist from location to location and plant to plant."[13] (Emphasis supplied.)

Other courts have echoed the opinion of the *Appalachian* court with regard to the need for flexibility in a regulatory program involving standards which are applied nationwide. For example, the Second Circuit in *Natural Resources Defense Council v. EPA* stated:

> "Not all of the thousands of plants in operation can be expected to fit into prefabricated molds or templates. By specifying a permit procedure, Congress implicitly conferred on the permit-grantor the privilege of construing the broader regulations in light of the specific type of plant applying for the permit. Without variance flexibility, the program might well founder on the rocks of illegality."[14]

Section 304 (b)(1)(B) of the Federal Water Pollution Control Act sets out the factors which are to be considered by the Administrator of EPA in specifying effluent guidelines for BPCTCA for non-publicly owned treatment works. According to

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13. Id. at 1358.

14. 537 F.2d 642 at 647. See also: *E. I. DuPont de Nemours and Co. v. Train*, 541 F.2d 1018 at 1028 (Fourth Circuit) and *American Paper Institute v. Train*, 9 ERC 1065 at 1070. (District of Columbia Circuit.)

the *Appalachian* court, as quoted above, all of those same factors must be considered again at the time of permit issuance where a discharger challenges the application of guideline limitations to his facilities. The factors listed in Section 304(b)(1)(B) are as follows:

> ". . . the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, . . . the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, *non-water quality environmental impact (including energy requirements)*, and such factors as the Administrator deems appropriate."[15] (Emphasis Supplied).

There have been no decisions in the Ninth Circuit which would indicate the proper application of variance regulations as a part of the NPDES permit program and we, of course, are not bound, in a strict legal sense, by the Fourth Circuit's decision in *Appalachian*. However, the *Appalachian* decision does leave a cloud on the continued viability of all variance provisions containing the same language as the provision considered in *Appalachian*. Further, we find the reasoning in the *Appalachian* decision compelling. Therefore, in the following discussion we evaluate the dischargers' arguments with regard to their entitlement to a variance based upon the costs, the non-water quality environmental impacts and the energy requirements of compliance with Guideline limitations.

4. *Contention that the Costs are Disproportionate to the Water Quality Benefits and thus justify the Issuance of a Variance.*

The dischargers introduced evidence that it would cost approximately $18¼ million for each facility for construction of the necessary treatment facilities to meet all Guideline and Ocean Plan limitations with the exception of the Ocean Plan chromium

15. 33 U.S.C. 1314(b)(1)(B).

requirements. Operation and maintenance costs are expected to be $1¼ million per year for each plant. Therefore, the total capital expenditure would be $36.5 million with an annual operation cost of $2.5 million. These costs are in addition to the costs which have already been incurred by the dischargers in constructing their existing ocean outfalls and diffusers. These costs were approximately $2 million each and represent costs which are not required by the Guidelines and would generally not be imposed upon similar discharges to a freshwater stream. The expected costs are substantial in that the original mills together cost approximately $110 million.

The dischargers contend that a variance should be granted because if the Guideline limitations are imposed they will sustain the above costs with no discernible water quality benefit. However, it should be noted that with regard *to economic* costs the *Appalachian* case found that a narrow consideration was required at the permitting stage.

In *Appalachian* the court specifically found that it was not necessary for EPA to provide for an analysis of economic costs versus water quality benefits on a plant-by-plant basis at the permit issuing stage, but that provision should be made for consideration of cost differentials between the guideline plants and the particular plant for which a permit is sought. Specifically, the court stated:

> "In requiring that EPA give weight to the relevant statutory factors in developing a subsequent variance provision, we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage. As we indicated in du Pont, 541 F.2d 1018, Nos. 75-1261, et al., an overall cost-benefit analysis for each category or subcategory satisfies the mandate of § 304 in this regard. The variance provision should, however, allow the permit issuer to consider significant cost differentials of the particular point source involved."[16]

16. *Appalachian, op. cit.*, note 3, at footnote 23, page 1360.

In this case, the dischargers have offered no evidence that the costs which they would sustain to meet the Guidelines are substantially different from the costs EPA found would be sustained on an industry-wide basis, and we find that with regard to economic costs, the dischargers have not sustained the burden of proof required in order to overcome the presumptive applicability of the Guideline limitations.

5. *Contention that the Adverse Non-water Quality Environmental Effects and Energy Requirements justify the Issuance of a Variance.*

In support of their position, the dischargers submitted evidence regarding the chemicals required, the direct and indirect power requirements, and potential sludge disposal problems. In summary the evidence is:

1. Chemical requirements: The chemical requirements for each facility are estimated to be approximately 4,320 tons per year of caustic soda, 546 tons per year of anhydrous ammonia, and 335 tons per year of phosphoric acid. Therefore, the total chemical requirements for both plants would be 8,640 tons per year of caustic soda, 1,092 tons per year of anhydrous ammonia, and 670 tons per year of phosphoric acid.

2. Energy requirements: For each facility the energy requirements would be 42,121,000 KWH/yr for construction (direct and indirect amortized over a 15 year period), 24,183,000 KWH/yr for operation of the facility for BOD removal, and 7,812,000 KWH/yr for the production of the necessary chemicals. Therefore, the total energy requirements for both plants would be 148,232,000 KWH/yr.

3. The process of BOD removal would result in 4,200 tons per year of biological sludge from each plant which, because of the unique situation of the dischargers' location on a sand spit in a heavy rainfall area, represent a very difficult problem regarding satisfactory means of disposal.

With regard to the consumption of energy, at the present time the generating capacity of the north coastal area only marginally exceeds the demand during the peak, mid-winter demand period. Additional demand will aggravate this energy problem. To supply the total annual demand, both direct and indirect, associated with the removal of BOD and pH adjustment at both plants would require the burning of 200,000 barrels of low sulphur fuel oil. The dischargers allege that burning of this amount of oil would result in two million pounds of air pollutants. This amount of power would supply approximately 21,000 homes.

With regard to the sludge disposal problem, it is not probable that a suitable disposal site can be located near the pulp mills because of the sandy nature of the Samoa Peninsula. If truck hauling is required, additional energy would be required. The alternative of incineration of sludge would also require energy and may result in air pollution.

On the other hand, as previously discussed, the dischargers have shown there is no expected environmental benefit to be gained by installation of the treatment facilities necessary to comply with the BOD and pH limitations.

In appraising the evidence related to non-water quality environmental effects and energy requirements the Board must at least in part appraise the significance in terms of the potential environmental benefits to be gained as a result of the imposition of the EPA Guidelines. In this case we have unrefuted evidence presented by the dischargers and concurred with by the Regional Board Executive Officer that the existing discharges result in no water quality problems. Secondly, there is no expected or predictable water quality improvement to be achieved as the result of imposition of the EPA Guidelines. In light of these facts (the magnitude of the chemical and energy requirements, and the potential air and land management problems associated with

sludge disposal) we can only conclude the evidence justifies the variance requested.[17]

In granting the requested variance, we are mindful of the intent of Congress in adopting the Federal Water Pollution Control Act that the regulation of discharges to the waters of the United States from similar dischargers be *as uniform as possible.* We feel that the concept of "presumptive applicability" of guidelines as enunciated by the Fourth Circuit in *Appalachian* provides for maintenance of this uniformity. Further, we feel that a flexible variance procedure such as that required by the Fourth Circuit will strengthen, rather than weaken, the regulatory process. As was stated by the District of Columbia circuit in *Portland Cement Association v. Ruckleshaus,*[18] ". . . a regulatory system

17. The alternative BOD and pH limitations contained in the permits attached to and adopted by this order are identical to the limitations for those constituents contained in the Regional Board orders. Those limitations are as follows:

Louisiana Pacific			
Constituent	Units	30-day Average	Daily Maximum
BOD_5 (pulp)	lbs/day	48,000	97,600
pH	within the limits 3.0 and 10.0		

Crown Simpson			
Constituent	Units	30-day Average	Daily Maximum
BOD_5 (pulp)	lbs/day	48,000	96,000
pH	within the limits 3.0 and 10.0		

If the Guideline limitations were applied to the dischargers their BOD and pH requirements would be as follows:

Louisiana Pacific			
Constituents	Units	30-day Average	Daily Maximum
BOD_5 (pulp)	lbs/day	9,821	18,849
pH	within the limits 5.0 and 9.0		

Crown Simpson			
Constituents	Units	30-day Average	Daily Maximum
BOD_5 (pulp)	lbs/day	9,660	18,540
pH	within the limits 5.0 and 9.0		

18. 486 F.2d 375 at 399, cert. denied 417 U.S. 921, followed in *Natural Resources Defense Council v. EPA,* 537 F.2d 642 at 647.

which allows flexibility, and a lessening of firm proscriptions in a proper case, can lend strength to a system as a whole. 'The limited safety valve permits a more rigorous adherence to an effective regulation. . . .'"

6. *Contention that Dischargers should be Granted Variance from the Ocean Plan.*

The dischargers have accepted the Guideline limitations for the suspended solids discharged by their pulp mills (turbidity is not a guideline parameter). They have requested that a variance from Ocean Plan[19] Table A limitations for suspended solids be granted (relaxation of limitations down to the level required by the Guidelines), and that the limitations on suspended solids and turbidity be applied only to waste generated in the pulp mills. Each company buys untreated Mad River water from the Humboldt Bay Municipal Water District and operates a water treatment plant to clarify, filter, and soften the water. The dischargers contend that wastes generated in the water treatment facilities consist almost entirely of material that would have been deposited in the ocean by the Mad River had the water not been diverted.

We agree that, in this instance, it is proper to apply the suspended solids limitations on a net basis. There is ample evidence in a record to support granting the variance requested from Ocean Plan, Table A, and to support application of effluent limitations for suspended solids contained in the Guidelines on a net basis.

Since it is extremely difficult to measure turbidity on a net basis and since the waste streams from the manufacturing processes typically have low turbidity, it is appropriate that no turbidity limitations be imposed.

19. See Footnote 4.

The dischargers have presented ample evidence that settleable solids and floating particulates need not be specifically controlled in this instance because all applicable water quality objectives can be met without imposing such controls. The dischargers have, further, presented ample evidence that the discharge of wastewater with pH within the limits of 3.0 to 10.0 will result in compliance with all applicable water quality objectives.

At the State Board hearing on December 22, 1976, the dischargers indicated that they would meet the limitations for grease and oil, toxicity, heavy metals (other than chromium), and phenolic compounds. Thus, no relief from the Ocean Plan limitations for these parameters is necessary.

We are aware of the difficulties involved in compliance with the Ocean Plan limitations for chromium and it is likely that the limitation will be changed as a result of the Ocean Plan review before the Table B limitations become effective. It is clear that the requirements for postponement of the compliance date contained in the Ocean Plan have been met and hence such an extension of time should be granted even though revision of the Plan is likely.

7. *Contention that a Decision by the State Board should be Held in Abeyance pending the Outcome of Litigation.*

We find no merit in the dischargers' request that their petition be held in abeyance pending the outcome of litigation in the federal courts regarding EPA's authority to issue relatively inflexible guidelines. We have been authorized to administer the NPDES permit program under Section 402 of the Federal Water Pollution Control Act, and unnecessary delay in the issuance of appropriate permits for the dischargers serves no useful purpose.

Further, the United States Supreme Court's decision in the *duPont* case, one of the decisions which the dischargers asked that we await, has now been rendered. With regard to variances,

the decision does nothing more than confirm the holding of the Fourth Circuit in the *duPont* case that a provision for variances from the 1977 limitations is required.[20] It does not clarify what the scope of the variance provision should be.

III. CONCLUSIONS

After review of this matter, and for the reasons heretofore expressed, we conclude that the actions of the Regional Board in adopting Orders Nos. 76-133 and 76-134 were generally appropriate and proper except that the Regional Board adopted effluent limitations less stringent than limitations based on the presumptively applicable EPA Guidelines without allowance for the required approval by the Administrator of EPA.

IV. *ORDER*

IT IS HEREBY ORDERED THAT:

1. Regional Board Orders Nos. 76-133 and 76-134 be set aside and replaced by the waste discharge requirements attached hereto and identified as Exhibit A and Exhibit B, which are hereby adopted.

2. The Executive Officer of the State Board forward to the Administrator of EPA all necessary information, data, and documents submitted by petitioner, together with a copy of this Order.

3. The waste discharge requirements, Exhibits A and B, be remanded to the Regional Board for all purposes including, but not limited to such modifications (if any) as are necessary to bring them into conformance with the effluent limitations determined to be appropriate by the Adminstrator of EPA subsequent to his review of this Order, other future modification of requirements as may be deemed necessary, and all appropriate enforcement activities.

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20. *E. I. duPont de Nemours and Company et al. v. Russell E. Train et al.*, 45 LW 4212 at 4217.

In addition, the State Board directs the Regional Board to prepare and issue an appropriate self-monitoring program to be applied to the dischargers for which the State Board has issued the waste discharge requirements.

Finally, the dischargers are granted an extension of time until July 1, 1983, to meet the effluent quality requirement for chromium contained in the Ocean Plan.

Dated: March 17, 1977

W. DON MAUGHAN
W. Don Maughan
Vice Chairman

WE CONCUR:

JOHN E. BRYSON
John E. Bryson, Chairman

W. W. ADAMS
W. W. Adams, Member

/s/ ROY E. DODSON
Roy E. Dodson, Member

JEAN AUER
Jean Auer, Member

Appendix E

Supreme Court of the United States

No. A-1034

CROWN SIMPSON PULP COMPANY AND
LOUISIANA-PACIFIC CORPORATION,
Petitioners

v.

ANNE M. GORSUCH, ADMINISTRATOR, ENVIRONMENTAL
PROTECTION AGENCY

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 10, 1981

/s/ WILLIAM H. REHNQUIST
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of June, 1981

Appendix F

STATUTORY AND REGULATORY PROVISIONS INVOLVED

33 U.S.C. § 1311(a) and (b) [Sections 301(a) and (b) of the Clean Water Act] provides in pertinent part:

> (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.
>
> (b) In order to carry out the objective of this Act there shall be achieved—
>
> (1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act.

33 U.S.C. § 1314(b) [Section 304(b) of the Clean Water Act] provides:

> (b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—
>
> (1) (A) identify, in terms of amounts of constitutents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b) (1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories of classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, nonwater quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and

classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants; and

(4) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 301(b) (2) (E) of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

40 C.F.R. § 430.72 provides in pertinent part:

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry sub-

categorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.

40 C.F.R. § 125.31 provides:

(a) A request for the establishment of effluent limitations under this subpart (fundamentally different factors variance) shall be approved only if:

(1) There is an applicable national limit which is applied in the permit and specifically controls the pollutant for which alternative effluent limitations or standards have been requested; and

(2) Factors relating to the discharge controlled by the permit are fundamentally different from those considered by EPA in establishing the national limits; and

(3) The request for alternative effluent limitations or standards is made in accordance with the procedural requirements of Part 124.

(b) A request for the establishment of effluent limitations less stringent than those required by national limits guidelines shall be approved only if:

(1) The alternative effluent limitation or standard requested is no less stringent than justified by the fundamental difference; and

(2) The alternative effluent limitation or standard will ensure compliance with sections 208(e) and 301(b)(1)(C) of the Act; and

(3) Compliance with the national limits (either by using the technologies upon which the national limits are based or by other control alternatives) would result in:

(i) A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

(ii) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the national limits.

(c) A request for alternative limits more stringent than required by national limits shall be approved only if:

(1) The alternative effluent limitation or standard requested is no more stringent than justified by the fundamental difference; and

(2) Compliance with the alternative effluent limitation or standard would not result in:

(i) A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

(ii) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the national limits.

(d) Factors which may be considered fundamentally different are:

(1) The nature or quality of pollutants contained in the raw waste load of the applicant's process wastewater;

[*Comment:* (1) In determining whether factors concerning the discharger are fundamentally different, EPA will con-

sider, where relevant, the applicable development document for the national limits, associated technical and economic data collected for use in developing each respective national limit, records of legal proceedings, and written and printed documentation including records of communication, etc., relevant to the development of respective national limits which are kept on public file by EPA.

(2) Waste stream(s) associated with a discharger's process wastewater which were not considered in the development of the national limits will not ordinarily be treated as fundamentally different under paragraph (a) of this section. Instead, national limits should be applied to the other streams, and the unique stream(s) should be subject to limitations based on section 402(a)(1) of the Act. See § 125.2(c)(2).]

(2) The volume of the discharger's process wastewater and effluent discharged;

(3) Non-water quality environmental impact of control and treatment of the discharger's raw waste load;

(4) Energy requirements of the application of control and treatment technology;

(5) Age, size, land availability, and configuration as they relate to the discharger's equipment or facilities; processes employed; process changes; and engineering aspects of the application of control technology;

(6) Cost of compliance with required control technology.

(e) A variance request or portion of such a request under this section shall not be granted on any of the following grounds:

(1) The infeasibility of installing the required waste treatment equipment within the time the Act allows.

[*Comment:* Under this section a variance request may be approved if it is based on factors which relate to the discharger's ability ultimately to achieve national limits but not if it is based on factors which merely affect the discharger's ability to meet the statutory deadlines of sections 301 and 307 of the Act such as labor difficulties, construction schedules, or unavailability of equipment.]

(2) The assertion that the national limits cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factor(s) listed in paragraph (d) of this section;

[*Comment:* Review of the Administrator's action in promulgating national limits is available only through the judicial review procedures set forth in section 509(b) of the Act.]

(3) The discharger's ability to pay for the required waste treatment; or

(4) The impact of a discharge on local receiving water quality.

(f) Nothing in this section shall be construed to impair the right of any State or locality under section 510 of the Act to impose more stringent limitations than those required by Federal law.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 23 1981
ALEXANDER L. STEVAS
CLERK

No. 81-289

In the Supreme Court of the United States

OCTOBER TERM, 1981

CROWN SIMPSON PULP COMPANY, ET AL., PETITIONERS

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a variance from the best practicable control technology requirements of Section 301(b)(1)(A) of the Clean Water Act, 33 U.S.C. 1311(b)(1)(A), may be granted where the only fundamental differences proffered in support of the variance concern receiving water quality factors.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 642 F.2d 323. The decision of the Administrator of the Environmental Protection Agency (Pet. App. 12-41) is reported at 10 E.R.C. 1841. A prior decision of the court of appeals in this case is reported at 599 F.2d 897.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1981. On June 18, 1981, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including August 10, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to Section 301 of the Clean Water Act, 33 U.S.C. (& Supp. III) 1311, the United States Environmental Protection Agency has promulgated regulations limiting the amount of effluent that may be discharged into navigable waters. Section 301(b)(1)(A) of the Act, 33 U.S.C. 1311(b)(1)(A), requires dischargers to achieve effluent limitations based upon best practicable control technology (BPT) by July 1, 1977,[1] and specifies that EPA is to establish those limitations by reference to the factors set out in Section 304(b), 33 U.S.C. (& Supp. III) 1314(b). In February 1976, acting pursuant to Section 301(b), EPA issued BPT limitations governing discharges from various types of bleached kraft pulp, paper and paperboard mills. 40 C.F.R. Part 430, Subparts F-I. The regulations provide for a variance from the effluent limitations for a discharger that demonstrates that "factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines" (40 C.F.R. 430.62).

A permit system is used to implement the effluent limitations applicable to particular dischargers. In order to release pollutants into navigable waters, a discharger must obtain a National Pollutant Discharge Elimination System (NPDES) permit. Pursuant to Section 402 of the Act, 33 U.S.C. (& Supp.

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[1] Dischargers are also directed to achieve more stringent levels of effluent limitations, *i.e.*, best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT), by July 1, 1984. 33 U.S.C. (Supp. III) 1311(b)(2).

III) 1342, EPA issues NPDES permits directly, except in those states in which it has approved state administration of the NPDES program. California's program has received EPA approval, and the California State Water Resources Control Board is authorized to grant NPDES permits. EPA must be notified of all action taken regarding permit applications, however, and, if it acts within 90 days, EPA may veto the issuance of any permit. 33 U.S.C. (& Supp. III) 1342(d).

2. Petitioners operate bleached kraft pulp mills located near Eureka, California, that discharge pollutants into the Pacific Ocean. They initially sought NPDES permits from the California Regional Water Resources Board, North Coast Region. The Regional Board proposed to issue permits to petitioners, but EPA's regional director of enforcement objected to the proposed permits because they did not require petitioners to achieve effluent limitations based upon the best practicable control technology (BPT) available, as required by 33 U.S.C. 1311(b)(1)(A). 599 F.2d 897, 899-900 (9th Cir. 1979).

Petitioners then sought variances from EPA's BPT regulations from the State Board. On March 17, 1977, the State Board granted the requested variances subject to EPA approval, and proposed to issue permits based on those variances (Pet. App. 3-4; 599 F.2d at 900). On May 26, 1977, the EPA General Counsel issued a Recommended Decision of the Administrator recommending denial of the variances. 42 Fed. Reg. 28167-28172 (1977). On September 15, 1977, the EPA Administrator issued a final decision denying petitioners' variance requests and disapproving the proposed permits because they excused petitioners from complying with effluent limitations based on the best practical control tech-

nology available on the basis of local water quality considerations (Pet. App. 12-41). EPA's decision was based upon a review of the extensive record compiled during the state proceedings, briefs submitted by petitioners and written comments on the recommended decision by, *inter alia*, petitioners (Pet. App. 12-14).

The court of appeals initially held that it did not have jurisdiction to review the Administrator's action. 599 F.2d at 900. This Court reversed that determination. 445 U.S. 193 (1980). On remand, the court of appeals affirmed the Administrator's decision (Pet. App. 1-10).

ARGUMENT

The court of appeals expressly held (Pet. App. 5-6) that the State Board would not have granted the variances requested by petitioners were it not for the Board's consideration of receiving water quality factors, and that the Board had made no determination that the non-water environmental consequences of adherence to EPA's guidelines would be fundamentally different for petitioners' plants than they were for other plants in the industry. The petition thus raises the question whether EPA must consider receiving water quality factors in determining whether a discharger is entitled to a variance from the BPT regulations issued pursuant to 33 U.S.C. 1311(b)(1)(A). Specifically, petitioners contend that the determination whether a discharger is entitled to a variance requires a cost/benefit analysis that takes into account receiving water quality factors. The court of appeals correctly rejected this contention. That decision conflicts with no decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. In 1972 the Clean Water Act was amended to redirect the focus of water pollution control from the quality of the receiving water to the technological control of the discharge of effluent itself. *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 202-205 (1976); *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239, 242 (4th Cir. 1979), rev'd on other grounds, 449 U.S. 64 (1980); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1042 (D.C. Cir. 1978). In establishing effluent limitations guidelines, EPA is required to consider non-water quality environmental impact, rather than water quality impacts. *Weyerhaeuser Co.* v. *Costle*, *supra*, 590 F.2d at 1041-1044 ("Congress made the deliberate decision to rule out arguments based on receiving water capacity").[2] The court of appeals thus was clearly correct in concluding that EPA properly limited variance considerations to non-water quality elements. Accord, *Consolidation Coal Co.* v. *Costle*, *supra*, 604 F.2d at 244-245; *Weyerhaeuser Co.* v. *Costle*, *supra*, 590 F.2d at 1036.

2. There is no conflict between the decision below and any decision of this Court or any other court of appeals.[3] The issue before this Court in *EPA* v.

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[2] In only two limited instances is receiving water quality to be considered in relaxing standards—in the cases of thermal pollution (Section 316(a) of the Act, 33 U.S.C. 1326(a)) and discharges from publicly owned treatment works into marine waters (33 U.S.C. (Supp. III) 1311(h)). Otherwise, receiving water quality is to be considered only in setting *more* stringent standards than effluent limitations otherwise would prescribe. See 33 U.S.C. 1311(b)(1)(C).

[3] Petitioners also contend (Pet. 14-16) that the decision below conflicts with the Ninth Circuit's prior decision in *Association of Pacific Fisheries* v. *EPA*, 615 F.2d 794 (1980). As the court of appeals explained (Pet. App. 9; emphasis in

National Crushed Stone Association, 449 U.S. 64 (1980), was whether, in ruling on a request for a variance from the BPT limitations, EPA was required to take into consideration the discharger's economic ability to comply with those regulations. The question raised by the petition in this case—whether EPA also is required to take into account receiving water quality factors—was not before the Court in *Crushed Stone*.

Nor was the relevance of receiving water quality factors at issue in *Appalachian Power Co.* v. *Train*, 545 F.2d 1351 (4th Cir. 1976). Moreover, as the quotation contained in the petition (at 13) itself makes clear, the language from *Appalachian Power Co.* v. *Train*, 620 F.2d 1040, 1046 (4th Cir. 1980), on which petitioners rely (at 13-14) was mere dictum. Indeed, in that same case the Fourth Circuit, consistent with its prior decision in *Consolidation Coal Co.*, *supra*, and the District of Columbia Circuit's decision in *Weyerhaeuser Co.*, *supra*, reiterated (620 F.2d at 1045) that "the quality of receiving water of itself is not a fundamental difference upon which a variance can be granted."

3. Petitioners also contend (Pet. 16-19) that the decision below improperly usurps the State's role

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original), however, it did not hold in *Pacific Fisheries* that "the agency *must* consider water quality in framing effluent guidelines. Indeed, we explicitly affirmed the D.C. Circuit's position [enunciated in *Weyerhaeuser Co.*, *supra*] that the Act seeks to reduce pollution by technology based standards and not by standards based on receiving water quality. Thus, [in *Pacific Fisheries*,] we only permitted a limited consideration of receiving water quality in an unusual factual setting." In any event, any conflict that may exist within the Ninth Circuit is for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

in the administration of the Clean Water Act. In this case, however, EPA accepted for purposes of argument the validity of the State Board's findings of fact (Pet. App. 10). EPA, therefore, has not usurped the State's factfinding function. Compare *Cleveland Electric Illuminating Co.* v. *EPA*, 603 F.2d 1, 6-7 (6th Cir. 1979). Even after a State begins administrating the NPDES program, EPA "remains the dominant agency for achieving the purposes and goals of the 1972 Amendments." *Cleveland Electric Illuminating Co.* v. *EPA*, *supra*, 603 F.2d at 5. Furthermore, neither EPA nor the judiciary is required to defer to a state's interpretation of the Act. Accordingly, EPA has not improperly usurped any function of the State in determining that, as a matter of law, the Clean Water Act does not permit variances from BPT requirements based on receiving water quality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

CROWN SIMPSON PULP COMPANY, and
LOUISIANA-PACIFIC CORPORATION,
Petitioners,

vs.

ANNE M. GORSUCH, Administrator,
Environmental Protection Agency,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply Brief

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply Brief

Crown Simpson Pulp Company and Louisiana-Pacific Corporation ("petitioners") submit the following reply to the Brief for the Respondent in Opposition ("Brief in Opposition").[1]

1. Pursuant to Rule 28.1 of the Rules of the Supreme Court, a listing of all non-wholly owned affiliates of petitioners is contained in the petition for a writ of certiorari filed herein on August 10, 1981.

I. THE GOVERNMENT'S BRIEF IN OPPOSITION SQUARELY RAISES AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION ON WHICH A DECISION BY THIS COURT IS NEEDED

In its Brief in Opposition the government accepts as true the state's finding in this case that imposition of EPA's effluent guidelines for BOD and pH on petitioners' facilities would result in no environmental benefit whatsoever, but instead would cause a net environmental harm. Brief in Opposition, p. 7. At the same time, the government boldly asserts that even in these circumstances the Clean Water Act prohibits the granting of a variance. Brief in Opposition, pp. 4, 7. The government's position—that under the Clean Water Act costly treatment requirements may be imposed on a discharger regardless of the presence or absence of expected benefit—not only lacks common sense, but entirely reads out of the Act the requirement that effluent limitations for individual facilities be set taking into consideration, among other things, "the total cost of application of technology *in relation to the effluent reduction benefits to be achieved* . . . ." Section 304(b)(1)(B) of the Clean Water Act, 33 U.S.C. § 1314(b)(1)(B). The government thus sharply draws the issue presented by the petition for a writ of certiorari: What meaning is to be given Section 304 of the Clean Water Act?

EPA apparently believes that under Section 304 it may (but is not required to) take water quality factors into account in the cost/benefit equation it uses to set effluent guidelines (see discussion of *Association of Pacific Fisheries v. EPA*, 615 F.2d 794 (9th Cir. 1980), Brief in Opposition, at p. 5, n. 3). And presumably, when EPA issues the general guidelines, it first determines that some expected benefit will be obtained which is worth the anticipated costs of treatment. See, *EPA v. National Crushed Stone Associa-*

tion, 449 U.S. 64, 76-77 (1980). However, in EPA's view, concurred in by the court below, state agencies authorized to administer the Clean Water Act program may not under Section 304 evaluate whether that same balance would be achieved when applying EPA's guidelines to individual facilities. This view is contrary to that expressed by this Court in *National Crushed Stone, supra,* 449 U.S. at 76-77.

This case does not raise the issue presented in *National Crushed Stone, supra,* of whether a state may grant a variance where it, in effect, *disagrees* with EPA's determination that the benefits to be expected from treatment are worth the costs. This case presents the question whether a state, in setting effluent limitations for a specific discharger, may examine the calculation used by EPA in setting its general guidelines, weigh in the process *all* of the factors specified in Section 304 of the Act, and grant a variance where it finds that one critical element of the equation—the expected environmental benefit—is altogether lacking. In those circumstances, which are undisputed here, the economic and environmental costs of imposing the guidelines take on an entirely different aspect. It is one thing to accept some detriment to one aspect of the environment if some substantial benefit is to be expected elsewhere, and quite another to incur that detriment with *no* concomitant benefit at all. That is what the state recognized in this case and the reason it granted a variance. The state examined and weighed the magnitude of the costs of applying the BOD and pH guidelines in relation to the complete absence of expected benefits to be derived, and granted a variance when it found a fundamentally different result from that intended—a net environmental loss. Section 304(b)(1)(B) mandates that type of analysis by the permitting agency

when considering discharge requirements for individual facilities. Both EPA and the court below prohibited the state from doing so.

II. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS AND WITH DECISIONS OF THIS COURT ON THE ISSUE PRESENTED

The government dismisses the conflict issue by attempting to distinguish procedurally the cases cited by petitioners as examples of the existing conflict among the circuits. However, as shown in the petition for writ of certiorari, the position espoused by the government in this case, and adopted by the Ninth Circuit, has twice been expressly rejected by the Fourth Circuit in *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1364 (4th Cir. 1976) and in *Appalachian Power Co. v. Train*, 620 F.2d 1040, 1046 (4th Cir. 1980). That the issue was not directly decided by the Fourth Circuit in the *Appalachian* cases is attributable only to the fact that the court could not believe that "the Administrator in actual practice, or in the administration of the statute, takes the same extreme position his attorneys do in the brief in this case." *Appalachian Power Co., supra*, 620 F.2d at 1046. Subsequently, EPA clarified exactly what its position was and the *Appalachian* litigation is once again before the Fourth Circuit on this very issue.[2]

The government's position, and the opinion below, also conflict with this Court's decision in *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), which permitted EPA to promulgate presumptively applicable effluent guidelines only if it implemented a meaningful variance mechanism, and with this Court's decisions in *EPA v. National*

2. See petition for writ of certiorari, p. 13, n. 7.

Crushed Stone Association supra, and *American Textile Manufacturers Institute, Inc. v. Donovan,* ..... U.S. ....., 101 S.Ct. 2478 (1981). In *National Crushed Stone* the Court suggested that the proper variance mechanism under Section 304 of the Clean Water Act should involve a recalculation of the equation used by EPA in promulgating general guidelines to determine if those guidelines fit individual facilities, 449 U.S. at 76-77. In *American Textile Manufacturers,* this Court specifically indicated that a cost/benefit analysis was appropriate under Section 304(b)(1)(B) of the Act. 101 S.Ct. at 2491, n. 30. The decision below directly conflicts with both these decisions in ruling that the reexamination of the cost/benefit analysis, including water quality factors, made here by the state was impermissible as a matter of law.

III. THIS CASE PRESENTS A QUESTION OF FUNDAMENTAL AND NATIONAL IMPORTANCE

Whether EPA can require treatment for treatment's sake to the detriment of the environment is an issue of extreme economic and environmental importance affecting thousands of industrial concerns throughout the country and untold environmental resources. In the case of petitioners alone, EPA's requirements would cost millions of dollars each and will result in the annual emission of tons of unnecessary air pollutants and biological sludge and in other environmental and energy losses of substantial magnitude. Moreover, the fundamental disagreement over this issue has resulted in years of delay, expense and uncertainty for petitioners as well as other similarly situated companies. A decision by this Court is needed to clarify an issue going to the very heart of the Clean Water Act, so that industry and the public may proceed towards attaining the goals of

the Clean Water Act without needless and costly economic and environmental sacrifice.

IV. CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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